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VOLUNTARY SCHOOL PRAYER CONSTITUTIONAL AMENDMENT

HEARINGS

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

S.J. Res. 73

A JOINT RESOLUTION PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES RELATING TO VOLUNTARY SCHOOL PRAYER

AND

S.J. Res. 212

A JOINT RESOLUTION PROPOSING AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES RELATING TO VOLUNTARY SILENT PRAYER OR MEDITATION

APRIL 29, MAY 2, AND JUNE 27, 1983

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VOLUNTARY SCHOOL PRAYER CONSTITUTIONAL AMENDMENT

FRIDAY, APRIL 29, 1983

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:17 a.m., in room SD-628, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the subcommittee) presiding.

Staff present: Stephen J. Markman, chief counsel; Philip Barker, professional staff member; and Claire Greif, chief clerk.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Senator HATCH. Ladies and gentlemen, this is the first of 2 days of hearings by the Subcommittee on the Constitution on proposed amendments to the Constitution relating to school prayer.

In particular, we hope to focus on Senate Joint Resolution 73 which Senator Thurmond and myself have introduced at the request of the administration. This amendment would restore the right of school children to engage in voluntary group prayer at the outset of the school day. No student, however, would be required to participate in such prayer.

I regret having to support another amendment to the U.S. Constitution. There is no one in this body who is more respectful of the work done by the founders and less confident of the ability of Congress to improve upon that work.

Once again, however, the proposed constitutional amendment before this subcommittee is one that seeks to restore to the Constitution a traditional understanding abruptly overturned by the Supreme Court in recent years. In my view, it is the Supreme Court that has engaged in amending the Constitution.

They have engaged in constitutional amendment in their decisions in *Engel* v. *Vitale* and *Abington* v. *Schemp.* I do not see what alternative Congress now has in restoring the traditional understanding of the first amendment establishment clause short of a constitutional amendment adopted through the proper article V route.

In decisions such as *Engel* and *Abington,* as well as others not directly related to school prayer, the Supreme Court has established a theory of the first amendment that is thoroughly contrary to the intentions of the original Founding Fathers, the spirit of the Constitution, the historical development of the first amendment, and the will of the citizenry.

The purpose of the first amendment establishment clause was not to erect a "wall of separation" between the state and all expressions of religious sentiment. As Professor Cord has made clear in his monumental work on the first amendment, its purpose was to prohibit the national government from establishing a preferred religion or an official church. The first amendment was not intended to divorce entirely the state from any relationship with the religious impulse.

To do that, as Professor Cord demonstrates, would have been to divorce the state from the very infusion of values that motivated the Constitution in the first place.

What we have recently seen in the *Lubbock* case, in which a school district has been barred from allowing voluntary student religious groups from meeting on their own time on school premises, is an attempt to carry the "wall of separation" misconception of the first amendment to its logical extreme. *Lubbock* goes beyond prohibiting the state from encouraging religion in even a general manner, and seems to require that the state adopt a hostile attitude toward religion.

Alone among student extracurricular activities, those that relate to religion are to be barred from school premises. This is no longer an "establishment of religion" issue, but one in which the very free exercise of religion is involved.

While I believe that Senate Joint Resolution 73 is a meritorious amendment, I share some of the concerns raised by Senator Thurmond when he introduced this measure. I am concerned that any amendment approved by this subcommittee ensure that reasonable accommodation will be made to those school children who choose not to participate in group or individual prayer.

I am also concerned about how the content of any group prayer is to be determined. Any responsible amendment will have to be consistent with the value structure of our Constitution—protection of the rights of minorities, tolerance of diverse religious viewpoints, and the need to ensure that the very distinct spheres of church and state are maintained as distinct spheres.

I very much look forward to our witnesses today and next Monday offering a diverse perspective on which direction our nation ought to head in regard to the issue of the relationship between the state and the expressions of religious values.

This is an important issue. People all over this country feel strongly about allowing voluntary prayer in public schools. We hope during the course of these two hearings to have the best witnesses we can possibly find on all sides of the issue.

I hope we will be able to come up with a resolution that will be satisfactory to the vast majority of people in this country, and hopefully to a two-thirds majority of the U.S. Congress.

[Senate Joint Resolution 73, and a message from the President submitted to the 97th Congress follows:]

II

98TH CONGRESS
1ST SESSION

S. J. RES. 73

Proposing an amendment to the Constitution of the United States relating to voluntary school prayer.

IN THE SENATE OF THE UNITED STATES

MARCH 24 (legislative day, MARCH 21), 1983

Mr. THURMOND (for himself, Mr. HATCH, Mr. CHILES, Mr. ABDNOR, Mr. NICKLES, and Mr. HELMS) (by request) introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

---

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States relating to voluntary school prayer.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution if ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress:

"ARTICLE —

"Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer.".

97th Congress, 2d Session - - - - - - - House Document No. 97–180

CONSTITUTIONAL AMENDMENT

MESSAGE
FROM
THE PRESIDENT OF THE UNITED STATES
TRANSMITTING
A PROPOSED AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES TO ALLOW VOLUNTARY PRAYER IN PUBLIC SCHOOLS OR OTHER PUBLIC INSTITUTIONS

MAY 18, 1982.—Message and accompanying papers referred to the Committee on the Judiciary and ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
89–011 O · WASHINGTON : 1982

To the Congress of the United States:

I have attached for your consideration a proposed constitutional amendment to restore the simple freedom of our citizens to offer prayer in our public schools and institutions. The public expression through prayer of our faith in God is a fundamental part of our American heritage and a privilege which should not be excluded by law from any American school, public or private.

One hundred fifty years ago, Alexis de Tocqueville found that all Americans believed that religious faith was indispensable to the maintenance of their republican institutions. 1 de Tocqueville, *Democracy in America* 316 (Vintage ed. 1945). Today, I join with the people of this Nation in acknowledging this basic truth, that our liberty springs from and depends upon an abiding faith in God. This has been clear from the time of George Washington, who stated in his farewell address:

> Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. . . . And let us with caution indulge the supposition that morality can be maintained without religion. . . . (R)eason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

35 *The Writings of George Washington* 229 (J. Fitzpatrick ed. 1940).

Nearly every President since Washington has proclaimed a day of public prayer and thanksgiving to acknowledge the many favors of Almighty God. We have acknowledged God's guidance on our coinage, in our national anthem, and in the Pledge of Allegiance. As the Supreme Court has stated: "We are a religious people whose institutions presuppose a Supreme Being." *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952).

The founders of our Nation and the framers of the First Amendment did not intend to forbid public prayer. On the contrary, prayer has been part of our public assemblies since Benjamin Franklin's eloquent request that prayer be observed by the Constitutional Convention:

> I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth—that God governs in the affairs of men. . . . I also believe that without his concurring aid we shall succeed in this political building no better than the Builders of Babel: We shall be divided by our little partial local interests; our projects will be confounded and we ourselves shall become a reproach and bye word down to future ages. . . .
>
> I therefore beg leave to move—that henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business. . . .

1 *The Records of the Federal Convention of 1787*, 451–52 (M. Farrand ed. 1966).

Just as Benjamin Franklin believed it was beneficial for the Constitutional Convention to begin each day's work with a prayer, I believe that it would be beneficial for our children to have an opportunity to begin each school day in the same manner. Since the law has been construed to prohibit this, I believe that the law should be changed. It is time for the people, through their Congress and the State legislatures, to act, using the means afforded them by the Constitution.

The amendment I propose will remove the bar to school prayer established by the Supreme Court and allow prayer back in our schools. However, the amendment also expressly affirms the right of anyone to refrain from prayer. The amendment will allow communities to determine for themselves whether prayer should be permitted in their public schools and to allow individuals to decide for themselves whether they wish to participate in prayer.

I am confident that such an amendment will be quickly adopted, for the vast majority of our people believe there is a need for prayer in our public schools and institutions. I look forward to working with Congress to achieve the passage of this amendment.

RONALD REAGAN.

THE WHITE HOUSE, *May 17, 1982.*

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution if ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress:

"ARTICLE ——

"Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer."

(3)

Senator HATCH. Our first witness will be the Deputy Attorney General of the United States, Edward Schmults. Mr. Schmults, for whom I have very deep respect, delivered an extremely thoughtful statement on this same subject during the earlier hearings in the 97th Congress.

So, Ed, we will turn to you at this time.

STATEMENT OF EDWARD C. SCHMULTS, DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. SCHMULTS. Thank you very much, Mr. Chairman. If I may, I would like to submit a longer statement for the record, along with an analysis of the first amendment and the need for the Senate Joint Resolution No. 73, and I will summarize my statement.

Senator HATCH. That would be fine. Without objection, we will place the full statements of all witnesses in the record today as though fully delivered.

Mr. SCHMULTS. Thank you.

I am pleased to appear today on behalf of the administration to support Senate Joint Resolution 73. This resolution proposes an amendment to the Constitution to restore the opportunity to engage in prayer in our public schools and institutions.

The President feels strongly that Congress should support this proposed amendment and should act on it as quickly as possible. We would ask that the committee and the Senate work toward passage early in the 98th Congress so that the States can begin the process of ratification during 1983.

My prepared statement explains at greater length why this amendment is a sound and necessary solution to the problems resulting from the prohibition of prayer in our public schools and institutions. In this statement, I will simply summarize the principal concerns leading to the administration's decision to propose this amendment.

The President has proposed this amendment in order to permit once again voluntary prayer in public schools and other public institutions. It is intended to reverse the effect of two decisions of the Supreme Court—*Engel* v. *Vitale* and *Abington School District* v. *Schempp*—which held that it is an impermissible establishment of religion, in violation of the first amendment, for a State to foster group prayer or Bible readings by students in public schools.

Engel v. *Vitale* prohibited group recitation of the New York State Regent's Prayer in the public schools, although it was clear that students were not required to participate in the prayer.

In *Abington School District* v. *Schempp*, the Court struck down Pennsylvania and Maryland laws requiring that public schools begin each day with readings, without comment, from the Bible.

In the years following *Engel* v. *Vitale* and *Abington School District*, the courts have increasingly restricted the States from incorporating religious observances into the daily schedule of students in public schools, or even accommodating the students' desires to participate in prayer.

In one case, for example, a school principal's order forbidding kindergarten students from saying grace before meals was upheld. In another case, the Supreme Court affirmed a lower court decision striking down a school board policy of permitting students, upon request and with their parents' consent, to participate in a 1-minute prayer or meditation at the start of the school day.

Another court prevented a school from allowing students to conduct voluntary meetings for educational, religious, moral or ethical purposes before or after school, even though other nonreligious groups may do so.

These and other cases have resulted in a limitation which some have argued would appear to preclude any action by the States or Federal Government affirming a belief in God. Thus, in the view of many Americans, the one provision of the Constitution expressly intended to protect the religious liberty of the people has instead been construed to prevent them from expressing their religious beliefs through prayer.

Against the background of these decisions, the President has proposed a constitutional amendment that will, in his words, restore the simple freedom of our citizens to offer prayer in our public schools and institutions.

The administration's proposed amendment would restore prayer to a place in public life consistent with the Nation's heritage and, in our view, would accurately reflect the historical background of the establishment clause.

In discussing the scope of the establishment and free exercise clauses, Erwin N. Griswold, former dean of the Harvard Law School and former Solicitor General of the United States, stated, "These are great provisions of great sweep and basic importance, but to say that they require all traces of religion be kept out of any sort of public activity is sheer invention."

This amendment also reflects and reinforces this country's long history of recognizing the existence of a deity to whom humility and thanksgiving are due. For over 170 years, prayers or Bible readings were a familiar part of the schoolday for American children and were viewed as an appropriate expression of humility and gratitude for the blessings which had been bestowed upon this Nation and its people.

Our country's most important public documents and occasions have traditionally been marked by a recognition of our dependence on a supreme being. As the Supreme Court has stated, we are a religious people whose institutions presuppose a supreme being.

This amendment is needed because the free expression of prayer is of such fundamental importance to our citizenry that it should not be proscribed from public places. The overwhelming majority of Americans have repeatedly made it clear that they favor a restoration of voluntary prayer to the public schools.

Prayer in the public schools has long been considered a desirable and proper means of imparting constructive moral and social values to schoolchildren, while generally encouraging in them a practice of selfreflection and meditation.

Conversely, the exclusion of prayer from the daily routine of students could convey the misguided message that religion is not of high importance in our society.

The unintended but inevitable result of current judicial interpretations of the establishment clause is not state neutrality, but a complete exclusion of religion, which is, in effect, state discouragement of religion. The Government neutrality mandated by the Supreme Court on matters of religion has proven, in fact, to be unachievable.

The proposed constitutional amendment is essentially intended to restore the status quo with respect to the law governing prayer in public schools that existed before *Engel* v. *Vitale* and the *Abington School District* cases were decided; that is to say, when prayers such as the Regent's Prayer and readings from the Bible without comment were not thought to be unconstitutional.

However, the proposed amendment affirms the fundamental right of every person to reject any religious belief as he or she deems fit, and not participate in the expression of any religious belief.

By establishing that nothing in this Constitution shall be construed to prohibit individual or group prayer, the proposed amendment would make clear that the establishment clause of the first amendment could no longer be construed to prohibit the Government's facilitation of individual or group prayer in public schools.

The intent of the proposed amendment is to leave the decisions regarding prayer to the State or local school authorities and to the individuals themselves, who may choose whether they wish to participate. The proposed amendment would not require school authorities to allow or participate in prayer, but would permit them to do so, if desired.

The second sentence of the proposed amendment guarantees that no person shall be required to participate in prayer. This prohibition assures that the decision to participate in prayer in public schools and other public institutions will be made without compulsion.

In conclusion, we strongly urge prompt action on this proposed amendment so that the process of State ratification can begin. We began our national history with an unforgettable declaration that governments were instituted in order to secure to the people those inalienable rights, including life, liberty, and the pursuit of happiness, with which the people were endowed by their creator.

Those rugged and inspired individuals who founded this Nation understood the importance of recognizing the source of our blessings. It is time that we restore the ability of our school children to do so as well.

Thank you, Mr. Chairman. I would be happy to answer any questions you may have.

Senator HATCH. Thank you, Mr. Schmults. Could you please elaborate on the reason for including in this amendment the last sentence relating to the prohibition upon requiring students to participate in prayer rather than simply referring to voluntary prayer in the first sentence?

Mr. SCHMULTS. Mr. Chairman, we thought it was unwise to modify the concept of prayer in the first sentence. It might be that if you put "voluntary" before "prayer" in the first sentence that a court would conclude that a teacher, for example, could not lead the class in prayer.

We incorporated the concept of a voluntariness and a firm prohibition against any compulsion whatsoever in the proposed amendment by the addition of the second sentence, which makes very clear that no person can be required by the United States or any State to participate in prayer.

Senator HATCH. Well, the pertinent language in Senate Joint Resolution 73, the administration's version, is:

> Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any state to participate in prayer.

Let me just ask you this: What is meant in the proposed administration amendment by the phrase, or other public institutions? Does this mean that group prayer will be permissible in public libraries, museums, public buildings, et cetera, et cetera?

Mr. SCHMULTS. That is essentially correct, Mr. Chairman. I think the amendment, of course, deals primarily with the school prayer issue, but it is drawn so it is coextensive with the establishment clause.

It does not deal with private institutions because it was felt there was no need to do so. But it would make clear that in any public institution, such as those that you mentioned, it would be clearly permissible to have prayer conducted there.

Senator HATCH. Why did you not just limit it to schools, since that has been one of the major problems?

Mr. SCHMULTS. Well, again, that could have been done. We felt, for example, that there are some cases now asserting that you cannot open up legislative sessions with a prayer, and we felt that we would make this amendment coextensive with the establishment clause and deal with all public institutions. But it is true that school prayer is the principal reason for the amendment.

Senator HATCH. If you cannot open up legislative sessions with prayer, that would leave the Senate in a pretty tough predicament, would it not, because we pray every morning before we start a session?

Mr. SCHMULTS. Yes, it would.

Senator HATCH. Senate Joint Resolution 73 would not accord to any student a constitutional right to participate in school prayer, in my opinion. Do you agree with that?

Mr. SCHMULTS. That is correct. The amendment does not create a right to pray. It removes the prohibition, in a sense, imposed by the Supreme Court in those cases in the 1960's. It leaves people free to pray in public institutions, if they desire to do so.

Senator HATCH. Right. It would leave this decision either to the State or to the local school district, is that not true?

Mr. SCHMULTS. Yes, that is correct, and I think that is a very important point. Indeed, that is the way it was handled for over 170 years in this country.

Senator HATCH. Under Senate Joint Resolution 73, the administration's proposal, how would an appropriate prayer be drafted or selected?

Mr. SCHMULTS. Well, first of all, we have great confidence, and I think based on the traditions and the heritage of this country that that confidence is justified. It would basically leave it up to the local authorities—local school boards, teachers groups, parents groups—to decide if they should compose a prayer that would be led by either the students or the teachers, or whether indeed there should be a moment of silent meditation without any prayer being read.

This would really be left up to the local school authorities and other local groups, and they, presumably taking into account the makeup of the community and the desires of the local citizens, would, if they wanted to—and I stress that it is only permissible—compose a prayer.

It might be that the State or the locality would have a ban on that and, of course, that would be honored. This amendment does not deal with questions like that.

Senator HATCH. I see.

Mr. SCHMULTS. It will leave it up to the local people.

Senator HATCH. Mr. Schmults, how do we avoid the real-world embarrassment to a minority religion student who is forced to conspicuously leave the room during any particular expressions of prayer?

Mr. SCHMULTS. Well, Mr. Chairman, I must say I think that objection is overdrawn. How someone who desires not to participate is going to do so, it seems to me, can be left up to them. They may stand and say nothing if the other students are standing; they may leave the room; they may come in a little later. It will depend when the prayer or other period of meditation is being held.

But, certainly, I think it is a very fair point that it ought to be part of our educational instruction to teach people to be tolerant of the views of others and the religious beliefs of others. I really see nothing wrong whatsoever with teaching minorities that they ought to respect the views of the majority in matters of prayer and other things.

So, I really do not believe that this fear that people cite is really well-founded. I do not think the evidence over the 170 years that this was permitted in our schools would back up that fear.

Senator HATCH. What sort of accommodations could the school districts or the persons in charge of overseeing these areas of school prayer make to perhaps help these people who would disagree with any particular observance of prayer?

Mr. SCHMULTS. Well, I think there are a whole variety of ways. One, the prayer could start before the class, so those who did not want to participate could come in after it was over. It could be held at the end of the day. People could be permitted to leave the room, and a whole variety of things.

Presumably, this would be a matter that would be dealt with by those teachers and other school authorities who would be concerned with the views and the feelings of the minority. It seems to me this is something we ought to trust the people to work out.

Senator HATCH. Does a district have to make a reasonable accommodation under the administration amendment to those who do not want to participate in school prayer? Is there an obligation by the school district?

Mr. SCHMULTS. Yes; I would think that the school district would certainly be under an obligation to facilitate the exercise, if you will, by those who do not want to participate. In other words, I believe that if a school district made that difficult and put obstacles in the way of nonparticipation, that would raise very serious questions under this amendment and could be enjoined.

Senator HATCH. I see. Has the Department of Justice had the opportunity to focus on the so-called equal access issue involved in the *Lubbock* decision, and should this committee address this issue?

Mr. SCHMULTS. Well, that is certainly a very closely related issue, and we have thought about those issues and we are familiar with the *Lubbock* case and considered whether or not the Department should not participate in that case.

Secretary Bell testified just a day or two ago, I believe, on the equal access bills. In general, the administration certainly supports that concept. We are continuing to look at that issue and some of the constitutional and other questions raised by those equal access bills, but we certainly support that concept.

Senator HATCH. Let me ask you this question: Do you feel constitutional amendment is necessary to deal with the equal access situation?

Mr. SCHMULTS. Well, so far as school prayer in public schools is concerned, yes, we do. We considered very carefully if there were sort of other easier ways to do this; we know it is not easy to amend the Constitution.

We feel that the way to best restore certainty in this area and to avoid continuing years of litigation is by way of a constitutional amendment. Indeed, we think that the American people, so far as we have been able to tell from some recent polls, are certainly overwhelmingly in support of the concept of school prayer in public schools.

The President certainly believes that if the Congress will act on Senate Joint Resolution 73 and we can get it to the States, it will be rapidly approved by State legislatures. In some cases, they have approved constitutional amendments very rapidly, in a matter of weeks sometimes.

Senator HATCH. In dealing with the *Lubbock* issue, whether it be by constitutional amendment or by statute, which would you think would be the best approach, to require local school districts to provide equal access to religious and nonreligious extracurricular activities, or simply to make clear that nothing in the Constitution prohibits school districts from adopting this policy if they desire to?

If this is a true issue of free exercise, I would imagine that this policy ought to be made mandatory. But on the other hand, if we are primarily concerned with local control, perhaps it ought to be optional. Could you give me your viewpoint there?

Mr. SCHMULTS. Well, as I said earlier, while I think these two issues are related, the equal access question may be slightly different, in that the equal access question—as I understand the *Widmar* case which dealt with universities—basically on the point that if you permitted meetings to be held to discuss other public issues, you could not discriminate and refuse to permit a meeting to be held where a religious issue was going to be discussed.

I am not sure how that is ultimately going to come out when that issue comes to the Supreme Court. It might be that the Court would hold that even in the lower schools at any level, if you permitted meetings generally after school, you might be able to permit these meetings. I am not sure how that is going to come out.

But I think the concept of school prayer, as we know it traditionally in this country—and, as I said, as we have known it for 170 years—the possibility of having teachers lead the class in prayer or a moment of silent meditation during the school day, I do not think would really be dealt with by the equal access statutes.

Therefore, we feel, and the President feels strongly, that an amendment is needed to deal with that issue. But in all cases, I think we would make it, certainly with school prayer, optional on the part of the local school authorities.

Senator HATCH. Well, let me ask you this: Should the equal access concept be made mandatory, or should constitutional barriers to this policy simply be removed?

Mr. SCHMULTS. I think constitutional barriers, if there are any, should be removed, although again it is not clear how that is going to come out in the courts.

Senator HATCH. Does a district have to make reasonable accommodations under this amendment? Can we avoid extensive litigation on what constitutes "reasonable accommodations?"

Mr. SCHMULTS. Are you talking about on the right not to participate?

Senator HATCH. Right.

Mr. SCHMULTS. Our view is that that is really not going to be a substantial problem at all. I would not anticipate a lot of litigation over that. I believe that, really, the tradition we have had in this country to tolerate and honor religious diversity will mean that school authorities will be reasonable in this area.

I would suspect there will be very few instances where we will find school authorities being unreasonable in erecting obstacles that would mean that people would be embarrassed by not participating. I really do not believe that is a substantial question, Mr. Chairman, or will be a substantial problem.

Senator HATCH. Well, I just want to personally compliment you for your outstanding prepared statement. I think there has been a lot of thought and effort put into it and it is one of the best statements I have seen on this particular subject.

We appreciate the leadership you are providing and are very happy to have had you here, Mr. Schmults. Thank you for coming.

Mr. SCHMULTS. Thank you very much, Mr. Chairman.

Senator HATCH. We appreciate it very much.

[The prepared statement of Edward C. Schmults follows:]

PREPARED STATEMENT OF HON. EDWARD C. SCHMULTS

Mr. Chairman and Members of the Committee:

I am pleased to appear today on behalf of the Administration to support Senate Joint Resolution 73, a resolution proposed by the Administration and introduced in the Senate by Senators Thurmond, Hatch, Chiles, Abdnor, Nickles and Helms. This resolution proposes an amendment to the Constitution to restore the opportunity to engage in prayer in our public schools and institutions. The proposed amendment reads as follows:

> "Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer."

The President feels strongly that Congress should support this proposed amendment and should act on it as quickly as possible. We would ask that the Committee and the Senate work toward passage early in the 98th Congress, so that the states can begin the process of ratification during 1983.

In my statement, I will explain why this amendment is a sound and necessary solution to the problems resulting from the prohibition of prayer in our public schools and institutions. Mr. Chairman, I would also like to submit for the record a copy of the Administration's Analysis of this amendment.

I.

The President has proposed this amendment in order to permit, once again, voluntary prayer in public schools and other public institutions. It is intended to reverse the effect of two decisions of the Supreme Court, Engel v. Vitale, 370 U.S. 421 (1962), and Abington School District v. Schempp, 374 U.S. 203 (1963), which held that it is an impermissible "establishment of religion" in violation of the First Amendment for a state to foster group prayer or Bible readings by students in public schools.

In Engel v. Vitale, the Court embraced an interpretation of the First Amendment that prohibited group recitation of the New York State Regents' prayer in the public schools. Although it was clear that students were not required to participate in the prayer, the Court determined that state sponsorship and endorsement of a particular prayer violated the Amendment's proscription against an establishment of religion. In Abington School District v. Schempp, the Court struck down Pennsylvania and Maryland laws requiring that public schools begin each day with readings, without comment, from the Bible. Although the states' practices furthered secular purposes and excused unwilling students from participation, the Court found them to violate the Establishment Clause. Emphasizing the strict separation between church and state adopted in its previous constructions of the First Amendment, the Court concluded that the Establishment Clause precluded the government from favoring religion as against non-believers.

This prohibition against favoring religion as against non-believers, some have argued, would appear to preclude any action by the states or the federal government affirming a belief in God. Thus, in the view of many Americans, the one provision of the Constitution expressly intended to protect the religious liberty of the people has instead been construed to prevent them from expressing their religious beliefs through prayer.

In the years following Engel v. Vitale and Abington School District v. Schempp, the courts have increasingly restricted the states from incorporating religious observances into the daily schedule of students in public schools. In one case, for example, a school principal's order forbidding kindergarten students from saying grace before meals was upheld. 1/ In

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1/ Stein v. Oshinsky, 348 F.2d 999 (2d Cir.), cert. denied, 382 U.S. 957 (1965). See also DeSpain v. DeKalb County Community School District, 384 F.2d 836 (7th Cir. 1967), cert. denied, 390 U.S. 906 (1968).

another case, the Supreme Court affirmed a lower court decision striking down a school board policy of permitting students, upon request and with their parents' consent, to participate in a one-minute prayer or meditation at the start of the school day. 2/

The principles established in Engel v. Vitale and Abington School District v. Schempp have been extended recently to bar the accommodation or even toleration of students' desire to pray on school property even outside regular class hours. For example, one court prevented a school from allowing students to conduct voluntary meetings for "educational, religious, moral, or ethical purposes" before or after school, even though other, non-religious groups may do so. 3/ Other courts have forbidden voluntary prayer meetings, 4/ even the reading of prayers from the Congressional Record. 5/

Even the venerable tradition of having chaplains open legislative sessions with a prayer -- a tradition going back before the First Congress and widely followed in the states -- is now under serious attack in the courts. One federal court of appeals has already ruled that it is unconstitutional for a state legislature to have a chaplain to open its sessions with a prayer. 6/ A similar challenge to chaplains in Congress is now pending. 7/

2/ Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), aff'd mem., 102 S. Ct. 1267 (1982).

3/ Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038, 1042-48 (5th Cir. 1982), cert. denied, 103 S. Ct. 800 (1983); see also Brandon v. Board of Education, 635 F.2d 971, 977-79 (2d Cir. 1980), cert. denied, 102 S. Ct. 970 (1981); Trietley v. Board of Education, 65 A.D.2d 1, 409 N.Y.S.2d 912 (1978).

4/ Collins v. Chandler Unified School Dist., 644 F.2d 759 (9th Cir.), cert. denied, 102 S. Ct. 322 (1981).

5/ State Board of Education v. Board of Education, 108 N.J. Super. 564, 262 A.2d 21, aff'd, 57 N.J. 172, 270 A.2d 412 (1970), cert. denied, 401 U.S. 1013 (1971).

6/ Chambers v. Marsh, 675 F.2d 228 (8th Cir. 1982), cert. granted, 103 S. Ct. 292 (1982) (No. 82-23).

7/ Murray v. Buchanan, 674 F.2d 14 (D.C. Cir. 1982), vacated for rehearing en banc, No. 81-1301 (D.C. Cir.).

II.

Against the background of these decisions, the President has proposed a constitutional amendment that will, in his words, "restore the simple freedom of our citizens to offer prayer in our public schools and institutions." The pressing need for this amendment is apparent from numerous considerations.

In reversing the two principal Supreme Court decisions foreclosing prayer in public schools, the Administration's proposed amendment would restore prayer to a place in public life consistent with the Nation's heritage and, in our view, would accurately reflect the historical background of the Establishment Clause. The Administration's analysis of the proposed amendment demonstrates that the Establishment Clause was not intended to prohibit governmental references to or affirmations of belief in God. In discussing the scope of the Establishment and Free Exercise Clauses, Erwin N. Griswold, former Dean of Harvard Law School and former Solicitor General of the United States, stated: "These are great provisions, of great sweep and basic importance. But to say that they require that all traces of religion be kept out of any sort of public activity is sheer invention." 8/ And Justice Story concluded that "[a]n attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation" at the time the First Amendment was drafted. 9/

Second, this amendment reflects and reinforces this country's long history of recognizing the existence of a deity to

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8/ Griswold, Absolute is in the Dark--A Discussion of the Approach of the Supreme Court to Constitutional Questions, 8 Utah L. Rev. 167, 174 (1963).

9/ 3 J. Story, Commentaries on the Constitution of the United States, § 1868 (1833).

whom humility and thanksgiving are due. For over 170 years, prayers or Bible readings were a familiar part of the school day for American children, and were viewed as an appropriate expression of humility and gratitude for the blessings which had been bestowed upon this nation and its people.

Our country's most important public documents and occasions have traditionally been marked by a recognition of our dependence on a Supreme Being. For example, references to God can be found in the Mayflower Compact of 1620, the Declaration of Independence, the Pledge of Allegiance, and the National Anthem; on the Liberty Bell, the American Seal, our legal tender, monuments such as the Tomb of the Unknown Soldier, the Washington Monument, and the Lincoln and Jefferson Memorials; and in the oath of office taken by federal employees (including the President, all federal judges and members of Congress) and witnesses in judicial and legislative proceedings. American institutions have continued to reflect these religious beliefs as evidenced by the employment of chaplains in the legislatures and the armed forces, the proclamations and Inaugural Addresses made by almost every President, and the public recognition of Thanksgiving Day as a time set aside to express gratitude to a Supreme Being. 10/ Virtually all of the state constitutions refer to dependency on God. As the Supreme Court has stated, "We are a religious people whose institutions presuppose a Supreme Being." 11/

10/ In response to a request by the Congress, the President has proclaimed 1983 to be the Year of the Bible. Pub. L. No. 97-280, 96 Stat. 1211, Oct. 4, 1982; Proc. No. 5018, Weekly Comp. of Pres. Docs. 181 (Feb. 3, 1983).

11/ Zorach v. Clauson, 343 U.S. 306, 313 (1952).

Third, and closely related to the second point, this amendment is needed because the free expression of prayer is of such fundamental importance to our citizenry that it should not be proscribed from public places. The overwhelming majority of Americans have repeatedly made it clear that they favor a restoration of voluntary prayer to the public schools. Prayer in the public schools has long been considered a desirable and proper means of imparting constructive moral and social values to schoolchildren, while generally encouraging in them a practice of self-reflection and meditation. Conversely, the exclusion of prayer from the daily routine of students could convey the misguided message that religion is not of high importance in our society.

Fourth, by prohibiting students' voluntary prayers before meals, periods of meditation before class, and student prayer meetings in school buildings outside of class hours, the courts' concern with the Establishment Clause has appeared to overshadow the First Amendment right of students to free exercise of religion. As Justice Stewart has stated, "there is involved in these cases a substantial free exercise claim on the part of those who affirmatively desire to have their children's school day open with the reading of passages from the Bible." 12/ Although some may argue that those parents could pay to send their children to private or parochial schools, the Supreme Court has stated that "[f]reedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way." 13/

12/ Abington School District v. Schempp, 374 U.S. 203, 312 (1963) (Stewart, J., dissenting).

13/ Id. at 312-13, quoting Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943).

Fifth, the unintended but inevitable result of current judicial interpretations of the Establishment Clause is not state neutrality but a complete exclusion of religion which is, in effect, state discouragement of religion. The governmental "neutrality" mandated by the Supreme Court on matters of religion has proven in fact to be unachievable.

Finally, the amendment is needed because it would allow decisions of essentially local concern to be made by states and localities rather than the federal judiciary. For over 170 years, school prayer issues were resolved at the state and local levels by the residents of the affected communities. Their choices regarding school prayer reflected the desires and beliefs of the parents and children who were directly and substantially affected.

III.

The proposed constitutional amendment is essentially intended to restore the status quo with respect to the law governing prayer in public schools that existed before *Engel v. Vitale* and *Abington School District v. Schempp* were decided, *i.e.*, when prayers such as the Regents' prayer and readings from the Bible without comment were not thought to be unconstitutional. However, the proposed amendment affirms the fundamental right of every person to reject any religious belief, as he or she deems fit, and not participate in the expression of any religious belief.

By establishing that "Nothing in this Constitution shall be construed to prohibit individual or group prayer," the proposed amendment would make clear that the Establishment Clause of the First Amendment could no longer be construed to prohibit the government's facilitation of individual or group prayer in public schools. The amendment also would foreclose reliance upon the "implied coercion" theory advanced by the courts, which presumes that any group prayer by consenting students has a coercive effect upon the objecting students in violation of their right to free exercise of religion, and that therefore no prayer is constitutionally permissible. However, as discussed below, the proposed amendment expressly protects the right of objecting students not to participate in prayer. This provision is sufficient to protect the rights of those who do not wish to participate without denying to all others who desire to pray an opportunity to do so.

The intent of the proposed amendment is to leave the decisions regarding prayer to the state or local school authorities and to the individuals themselves, who may choose whether they wish to participate. The proposed amendment would not require school authorities to allow or participate in prayer, but would permit them to do so if desired. Group prayers could be led by teachers or students. Alternatively, if the school authorities decided not to take part in a group prayer, they would be free to accommodate the students' interest in individual or group prayer by permitting, for example, prayer meetings outside of class hours or student-initiated prayer at appropriate, nondisruptive times, such as a brief prayer at the start of class or grace before meals. School authorities could, of course, develop reasonable regulations governing the periods of prayer, in order to maintain proper school discipline.

If the school authorities choose to participate in a group prayer, the selection of the particular prayer -- subject of course to the right of those not wishing to participate not to do so -- would be left to the judgment of local communities, based on a consideration of such factors as the desires of parents, students and teachers and other community interests consistent with applicable state law. Thus, the proposed amendment would restore the practice maintained throughout most of this nation's history, in which the determination of the appropriate circumstances of prayer was made by state and local authorities. The amendment does not limit the types of prayer that are constitutionally permissible and is not intended to afford a basis for intervention by federal courts to determine whether or not particular prayers are appropriate for individuals or groups to recite. Because the proposed amendment merely would remove the bar of the Establishment Clause as construed by the Supreme Court, state laws regarding the availability of prayer in public schools would not be affected.

The amendment by its terms is not limited to public schools, and would apply to prayer in other public institutions as well. The intent of this language is to make the remedial provisions of this amendment coextensive with the reach of the First Amendment's Establishment Clause as construed by the Supreme Court. Although most questions relating to public prayer arise in the context of public schools, the proposed amendment is drafted to apply to prayer in other public institutions, including prayers in legislatures.

The second sentence of the proposed amendment guarantees that no person shall be required to participate in prayer. This prohibition assures that the decision to participate in prayer in public schools and other public institutions will be made without compulsion. Those persons who do not wish to participate in prayer may sit quietly, occupy themselves with other matters, or leave the room. Reasonable accommodation of this right not to participate in prayer must be made by the school or other public authorities. Thus, the exercise of the right to refrain from participating cannot be penalized or burdened.

The guarantee against required participation in prayer parallels and reaffirms the protection already afforded by the Free Exercise Clause of the First Amendment. Thus, the second sentence of the proposed amendment assures that students and others will never have to make a forced choice between their religious beliefs and participation in a state-sponsored prayer. Indeed, the second sentence of the proposed amendment provides greater protection than the Free Exercise Clause, because a person desiring not to participate in prayer need not show a religious basis for his belief. Accordingly, there would be no need for an inquiry into the religious basis for a person's decision not to participate in prayer.

The fact that one or more students do not wish to participate in prayer, however, would not mean that none of the students would be allowed to pray. The provision forbidding required participation in prayer is intended to be sufficient to protect the interests of those students. As the Supreme Court stated with respect to the Pledge of Allegiance, "the refusal of these persons to participate in the ceremony does not interfere with or deny the rights of others to do so." 14/ This would be the proper rule to apply with respect to school prayer: persons who do not wish to participate in prayer should be excused or may remain silent, but that should not interfere with or deny the rights of others who do wish to participate.

IV.

For these reasons, we strongly urge prompt action on this proposed amendment, so that the process of state ratification can begin. We began our national history with an unforgettable Declaration that governments were instituted in order to secure to the people those inalienable rights, including life, liberty and the pursuit of happiness, with which people were "endowed by their Creator." Those rugged and inspired individuals who

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14/ West Virginia State Board of Education v. Barnette, 319 U.S. 624, 630 (1943).

founded this nation understood the importance of recognizing the source of our blessings. It is time that we restore the ability of our schoolchildren to do so as well.

Mr. Chairman, I shall be glad to answer any questions you or members of the Committee might have.

Senator HATCH. Our next witness will be Ms. Bonnie Bailey, a senior student at Lubbock High School in Lubbock, TX. Monterey High School was, of course, involved in the notorious *Lubbock* decision, one of the Federal court decisions toward which this hearing is directed.

Ms. Bailey delivered such an outstanding piece of testimony yesterday on the equal access bill sponsored by Senator Denton that I asked her if she would be good enough to stay 1 more day and share her perspectives with this committee.

We are happy to have you here, Bonnie, and we will take your testimony at this time.

STATEMENT OF BONNIE BAILEY, STUDENT, MONTEREY HIGH SCHOOL, LUBBOCK, TX

Ms. BAILEY. Thank you. I would like to submit my——

Senator HATCH. Could you pull your microphone up closer?

Ms. BAILEY. OK.

Senator HATCH. And we will put your complete statement in the record, OK?

Ms. BAILEY. OK, thank you.

I am very pleased to be here today, and thank you for inviting me. I am in Washington just to try to get people to understand what is happening in Lubbock and across the Nation in different public schools and to understand that the freedom of religious speech is being denied to students thus discrimination is practiced against students.

Senator Hatch referred to the *Lubbock* case which has been going on for a few years. Until last year the Lubbock Independent School District allowed groups to meet on school property before or after regular school hours for educational, ethical, moral or religious purposes. We can no longer do that because the Lubbock Civil Liberties Union brought a suit against our school district and such meetings were held unconstitutional.

We have been taught in school for years that the Constitution guarantees the freedom of speech to all citizens. Americans can picket, demonstrate, curse and use God's name in vain, but when we want to get together to talk about God reverently, then we are not permitted to do so.

A lot of students, including myself, do not understand the inconsistency here that we can talk about anything else, but we cannot talk about religion.

During my sophomore year in high school, I participated in a group called "Morning Watch," which met before school. It was about 35 students out of 1,200 who would just meet together for inspiration before the schoolday started.

We came about a half an hour early to school and we had an adult sponsor, but we elected officers and ran the meetings ourselves. Some people would come to the meetings and decide that that was not what they wanted to do; they did not want to get up a half an hour early and so they would not come back. That was their decision and their choice, and they made that totally on their own.

It was not my impression that the school board favored our religious views or favored what we were doing over anyone else, which a lot of people were really worried about. None of us got that impression at all.

I also participated in the Fellowship of Christian Athletes, which was about 65 students out of 700. We would meet in the evening on a weekday and have an inspirational devotion and listen to singers and speakers. Again, we elected officers, so the adults and the sponsors were not running the programs.

No one was ever forced to come. Some of the athletes came; some did not. Some of the really good athletes did not come, and we did not feel like any athlete was favored just because he came to the FCA meetings or did not attend.

I also belonged to a group called Tri-Hi-Y which is affiliated with the Young Men's Christian Association, and because of our affiliation, we are not allowed to meet at any time in the school building after the court case.

This is a group of girls who do service activities for the community and for the school. We do a lot of benefit type activities and we cannot even hold a benefit dance in our school for the American Cancer Society or for other good causes since the *Lubbock* court case. We are no longer even allowed to do benefit things like this in our school.

With FCA, we cannot even play softball on the diamonds at any time in our school. I do not think this is something that is written into the policy, but the administration of our school and our school board are so afraid that they are going to step over a line and violate the court holding that they just do not allow anything. Everyone is confused as to what is allowed and what is not, so the school officials just play it safe.

It seems to us students that the school officials are hostile toward us because they do not even let us meet on an equal basis with other groups, with the chess club and the rodeo club and other group organizations that are not affiliated with the school. It really does seem to us that the Government is not neutral.

Many students are confused by what they see because we feel like we are not as impressionable as people think we are. Personally, I can decide if I want an abortion or if I would like to use contraceptives, but since the court case I cannot decide if I want to go to a meeting before or after school or if I want to listen to a prayer, or something like that because the choice is no longer there.

It seems inconsistent that I can decide if I want to take a child's life or have an abortion and I cannot decide whether I would like to go to a meeting or not. In 3 months I will be in college, and in 3 months I guess I will be pretty mature because then I can decide, according to the *Widmar* case, whether or not I would like to go to a meeting and what activities I would like to participate in.

Any club at our school that is not affiliated with any type of religious organization can meet at any time, and this just does not seem fair to us who are members of those organizations which cannot meet. It seems wrong to us that students can take the name of God in vain, but we cannot use it reverently on school property.

There is a lot of confusion and a lot of inconsistency that we do not understand, and I would like for you to try to understand the situation in Lubbock, and I think across the Nation.

Senator HATCH. That was a good statement. I do not know many high school students who could come in and testify as well as you have here today. For the sake of the record, I might add that the *Lubbock Civil Liberties* v. *Lubbock School District* case, decided in 1982, found in violation of the establishment clause a school district policy allowing equal access to school premises for student-initiated religious and nonreligious extracurricular activities.

In other words, the religious activities were foreclosed even though they were voluntary, even though they were basically student activities done by the students themselves, and that is what you are bringing out here today.

You have brought out a number of very important constitutional issues, and I want to compliment you for that. Let me just ask you a couple of questions, OK?

Ms. BAILEY. Yes.

Senator HATCH. Were the religious activities which you and your friends organized truly voluntary?

Ms. BAILEY. Yes, sir, I feel that they were because we had to make a special effort. There was never anything during school and we had to come early to school, which was sometimes hard to do; it is hard to drag yourself out of bed early. At night, we would have to set aside time to go to these other activities, so I think the religious activities were completely voluntary.

Senator HATCH. Well, could you describe for me some of the other extracurricular activities that take place in your high school which are permitted on school premises, although your strictly voluntary religious activities that a number of you young people wanted to engage in are not permitted?

Ms. BAILEY. All right. There is one that really stands out to me. We have church league basketball teams among all of the churches in our town and they cannot use any of the gyms at any time to sign up, to practice, to play the games, or anything else.

Yet, we have a privately sponsored league by businesses in our town which uses the school buildings for their sign ups, their practices, their games, and everything. So, that is just one outstanding example of discrimination.

As far as student activities go, we have the future homemakers, the future business leaders, the future teachers, the chess club, the rodeo club. There is a club for everything—quill and scroll, science clubs. They are allowed to meet at any time. All you have to do is go ask the principal and he will unlock the building.

Senator HATCH. But if you ask him if you can meet on a Tri-Hi-Y basis, which is apparently a group of Christian young women who get together, you are not permitted to do so?

Ms. **Bailey**. No, sir.

Senator **Hatch**. Or if you have the Fellowship of Christian Athletes, you are not permitted to meet at schoool, even though the students voluntarily want to do so and even though the facilities are open, is that right?

Ms. **Bailey**. Yes, sir, that is correct.

Senator **Hatch**. Well, what proportion of the student body took part in the various religious activities conducted in your school prior to this *Lubbock* decision? Could you tell us that?

Ms. **Bailey**. OK. In the Morning Watch Program, there were 35 out of 1,200.

Senator **Hatch**. Which program was that?

Ms. **Bailey**. Morning Watch; it was a devotional before school.

Senator **Hatch**. Run by students?

Ms. **Bailey**. Yes, sir.

Senator **Hatch**. With student officers?

Ms. **Bailey**. Yes, sir.

Senator **Hatch**. Purely voluntary?

Ms. **Bailey**. Yes; like I said, it is sometimes hard for us to get up early and to go. Some people would come and not come back because they would decide that that was not what they wanted, so I felt that it was completely voluntary.

It was 35 students out of 1,200, which indicates to me that there was not a lot of peer pressure to attend. In our junior high school, there were 65 out of 700 who participated in the Fellowship of Christian Athletes.

Senator **Hatch**. Was there any sense that those students who did not participate were shunned or discriminated against by students who did participate?

Ms. **Bailey**. I do not think so. The students who participated were in such a minority that I do not think there was any at all.

Senator **Hatch**. Well, I just want to personally thank you, Bonnie, for being with us today. I think your testimony has been very, very important. I think all too often, people fail to look at the side of those who want to do good things and who want to do them voluntarily and who do not want to discriminate in the area of religious observance and school prayer.

I think you have brought out some very important points today. I just want to compliment you and I want to wish you the best as you enter college in 3 months. I am sure you have a terrific future.

Ms. **Bailey**. Thank you for inviting me.

Senator **Hatch**. Thank you. It is great to have you with us.

[The prepared statement of Bonnie Bailey follows:]

PREPARED STATEMENT OF BONNIE BAILEY

Honorable members of the committee, I am pleased to be here. I appreciate your valuable time and your attention. I am Bonnie Bailey, a 17 year old senior at Monterey High School in Lubbock, Texas, which is a school of the Lubbock Independent School District. My parents are Ronald and Betty Bailey.

I feel that I can speak with some authority on the views of my students peers. This past year I was elected Governor of the State of Texas by 600 students who participated in the Youth in Government program, sponsored by the Y.M.C.A. I also serve on the Student Council of my school.

Until last year, the Lubbock School District permitted voluntary meetings of students on school property to discuss religious, moral or ethical matters before or after regular school hours. This policy was held unconstitutional last year in a case called Lubbock Civil Liberties Union against Lubbock Independent School District, of which you are all probably aware. Students are no longer allowed to meet on school property for these purposes. The court decision has had a bad impact on us students in Lubbock. On behalf of my fellow students, I want to share what the impact has been.

We have been taught that the Constitution guarantees freedom of speech to all citizens in this country, including students. However, apparently religious speech is not protected speech for us students. Americans are allowed to picket, demonstrate, protest, use four letter words, and take God's name in vain, and the courts seem to uphold their actions and their words as being protected by the Constitution even though they are highly offensive to some people who see or hear them. I have been told that students are guaranteed these freedoms of speech so long as they are not disruptive. However, we students are not allowed to speak of religious matters on school property in Lubbock or, I suppose, anywhere else. I do not understand this inconsistency.

Through my sophomore year in high school I participated in an activity at school called "Morning Watch". This was a voluntary program in which about 35 students out of 1200 met together in a school room before school began. Sometimes we had speakers. Sometimes students spoke. It was a few minutes of inspiration before the school day began. It was totally voluntary, and in fact, students had to make a special effort to get to school a half an hour early in order to attend the meeting. No one was forced or coerced into attending. A teacher served as an advisor. However, students ran this meeting. It was not my impression that the Lubbock schools favored our religious views over others. The school board and administration took this time of sharing and meeting together away from us. They took something very valuable from us when they refused to let the Morning Watch meeting continue this year.

I also participated in the Fellowship of Christian Athletes in ninth grade. Again, this was a group of about 65 students out of 700 meeting on a voluntary basis after school with a religious emphasis. Although two coaches served as advisors, we students elected officers and ran the meetings. Because of the new policy in Lubbock, we can no longer use the school building for meetings of the Fellowship of Christian Athletes.

My sister was a member of Y-Teens, an organization sponsored by the Y.W.C.A. and open to all girls regardless of their religious beliefs. This group was allowed to meet after school hours in the school building. However, it can no longer do this. I belong to Tri-Hi-Y, which is sponsored by the Y.M.C.A., and our group cannot meet at school at any time.

The impression of many students is that the school administration or the school board or the courts, or all of them, are hostile toward religion. Many Lubbock students were not aware that the school district defended in court its policy which would have allowed us to meet. When told that we could not meet for religious discussions, we assumed that the decision was willingly made by the school, not knowing that they were forced by the courts to discriminate against us.

It seems to us that the government is not neutral but that it is against religion. Many students look up to and respect the school board members, teachers, principals and judges. But on this important issue, the students feel that they have let us down. We look up to these leaders, and we see in them an antagonism toward religious speech. I, for one, cannot believe that the Constitution of the United States requires this, or that it is in the best interest of students.

Many students are confused by what they see. Congress is led in prayer. Our pledge to the flag, our coins, and many of our patriotic songs refer to God. Why should we be officially requested to say the pledge to the flag and refer to God on school property but not be permitted to have a voluntary discussion about the same God? Why should we be able to study great national heroes such as Presidents Lincoln and Kennedy and their faith in God, but not be permitted to discuss those same heroes and their faith on school property in a meeting of the Fellowship Christian Athletes?

Not being able to meet in empty school facilities before or after regular school has placed an additional burden on students and parents. Schools are ideal for student meetings as they are centrally located, and are usually empty before and after school hours. Our parents are paying for these facilities while they sit empty.

It appears to me that all student groups can meet except those which may have some religious motive or purpose. Social clubs, home economics clubs, vocal groups, foreign language students, and every other group can meet at school, but the Morning Watch, Fellowship of Christian Athletes, Y-Teens, and Tri-Hi-Y must meet somewhere else. This does not agree with what I read of the underlying principles upon which our nation was founded. What is the big difference which made religious free speech so important to our forefathers that they would fight and die for it, and so unimportant now that the courts would strike down a school policy which permits my friends and me to discuss religious matters on school property. I confess to not being smart enough to figure that out.

We need legislation to protect students' guaranteed freedom of speech. I am asking from each of you to make right a grievous wrong which now exists in this country. It is wrong that a student may use the name of God profanely but may not use it reverently. I hope that you will do your duty and remedy this perplexing situation.

Senator HATCH. Our next witness is Prof. Robert Cord of the Government Department of Northeastern University in Boston, MA. He is the author of the monumental work entitled, "The Separation of Church and State," which is as good an analysis of this subject as I think has ever been done.

Professor Cord, I want to compliment you on this book. It is the best analysis, I think, that has been done on this particular subject.

Professor CORD. Thank you, Mr. Chairman.

Senator HATCH. I think it is just a first-rate work. As one of the distinguished scholars in the country on the first amendment clause, I am pleased to welcome you here before the committee today. We look forward to taking your testimony.

Your complete statement will be placed in the record. If you could summarize it, it would be helpful to the committee.

STATEMENT OF ROBERT L. CORD, PROFESSOR OF POLITICAL SCIENCE, NORTHEASTERN UNIVERSITY, BOSTON, MA

Professor CORD. Thank you very much, Mr. Chairman.

HISTORICAL MEANING OF THE ESTABLISHMENT CLAUSE

Mr. Chairman and members of the committee staff, for more than 25 years I have had the privilege of studying, teaching, and writing about aspects of American constitutional law. In 1982 Lambeth Press of New York published my most recent book, "Separation of Church and State: Historical Fact and Current Fiction." [1]

I have not accepted your invitation today to argue as a partisan for or against a prayer amendment. I am here primarily as a student of the American Constitution to share my research and my understanding of the meaning of the American tradition of separation of church and state.

Further, while it may be axiomatic that a constitutional amendment by its very nature cannot be unconstitutional, I am also here to urge you not to submit to the Congress, and eventually to the States, any proposed amendment that violates the principles of church-state separation embraced by the Founding Fathers and enshrined in the first amendment.

What are these first amendment principles regarding religion that the framers held so dear? To answer that question, we must look to their words and actions.

James Madison introduced the Bill of Rights in the first Congress in part because many of the State ratifying conventions wanted more limitations placed on the authority of the Federal Government than existed in the original Constitution drawn up in the Philadelphia Convention.

Madison's first draft of what ultimately became the establishment clause shows his intent clearly: ". . . The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established. . . ." [2]

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[1] Robert L. Cord, "Separation of Church and State: Historical Fact and Current Fiction" (Lambeth Press, 143 East 37th Street, New York, New York 10016).

[2] Annals of the Congress of the United States: The Debates and Proceedings in the Congress of the United States," com. fr. authentic materials by Joseph Gales, Sr. (Washington: Gales and Seaton, 1834), p. 434. Emphasis added.

Even after Madison's draft was changed by congressional committee deliberations, when asked in debate on the House floor what the reworded clause meant, Madison said that he "apprehended the meaning of the words to be that Congress should not establish a religion and enforce the legal observation of it by law. . . ."[3]

On the basis of the resolutions passed by the Maryland, Virginia, New York, North Carolina and Rhode Island ratifying conventions,[4] on the basis of the original draft of Madison's religion amendment,[5] the debates within the first House and Senate[6] and Madison's final statement on the floor of the first House of Representatives,[7] I conclude that regarding religion, the first amendment was intended to accomplish three purposes.

First, it was intended to prevent the establishment of a national church or religion or the placing of any one religious sect, denomination, or tradition into a preferred legal status which characterized religious establishments.

Second, it was designed to safeguard the right of freedom of conscience in religious beliefs against invasion by the National Government. Third, it was so construed and constructed in order to allow the States, unimpeded, to deal with religious establishments and aid to religious institutions as they saw fit.[8]

COMPARING THE SUPREME COURT'S ESTABLISHMENT CLAUSE AND THE HISTORICAL ONE

Despite the fact that the first amendment was added to the Constitution in 1791, it was not until the *Everson Bus Transportation* case in 1947[9] that the U.S. Supreme Court comprehensively defined what its doctrine of church-State separation meant.[10]

In *Everson*, the Supreme Court ruled essentially that the purpose of the establishment clause was to create a high and impregnable wall between church and state. In that case and since, the opinions of the Court have invariably cited carefully selected historical documents and instances to justify their broad interpretation of the separation of church and state required by the Constitution.

In brief, in all of the major establishment clause cases, for over one-third of a century, the Supreme Court has sought to justify its church-state decisions with appeals to the actions of James Madison, Thomas Jefferson, the Virginia Legislature of 1786, the framers of the first amendment, and the historical events of the early years of the American Federal Republic.[11]

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[3] Ibid., Vol. I, p. 730.

[4] Jonathan Elliott, "Debates on the Federal Constitution," Vol. II (Philadelphia: J.B. Lippincott Co., p. 553; Vol. III, p. 659; Vol. I, p. 328; Vol. I, p. 334; Vol. IV, p. 244.

[5] "Annals of the Congress," Vol. I, p. 434.

[6] Robert L. Cord, Chapter One, "Separation of Church and State: Historical Fact and Current Fiction" (New York: Lambeth Press, 1982) and Michael J. Malbin, "Religion and Politics: The Intentions of the Authors of the First Amendment" (Washington, DC: American Enterprise Institute, 1978).

[7] Ibid., n. 3, supra

[8] Cord, "Separation, op. cit.," p. 15. Recognizing without approval, that the U.S. Supreme Court has held the prohibitions of the First Amendment applicable to the States through the Fourteenth Amendment Due Process Clause, the still relevant purposes of the religious guarantees of the First Amendment now delimit state as well as Federal authority.

[9] *Everson* v. *Bd. of Education*, 330 U.S. 1 (1947).

[10] Ibid., at pp. 15-16.

[11] Representative opinions of the Court to substantiate this statement can be found in *Everson* v. *Bd. of Ed.*, 330 U.S. 1 (1947); *Zorach* v. *Clauson*, 343 U.S. 306 (1952—; *McGowan* v. *Maryland*,

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Following the high court's lead, so too have the lower courts of the land. "What does the historical intent behind the establishment clause require us to rule in this case?" seems to be the unuttered question always to be answered by the Court's opinion.

Simply put, the Court has used its "American history" to legitimize its decisions. "Thus saith history" has been the Court's most common and consistent approach in deciding what the establishment clause forbids.

But a careful and not an extremely selective search of American primary historical documents indicates beyond a reasonable doubt that, in fact, no high and impregnable wall between church and state was historically erected by the first amendment, and for a very simple reason: None was constitutionally intended by the framers of that amendment.[12]

To be sure, the framers of the first amendment believed in separation of church and state. In 1791, no other country had provided so carefully to prevent the combination of the power of religion with the power of the national government.

However, I believe my recent book shows conclusively that the framers of the establishment clause meant separation between church and state to be something other than what the United States Supreme Court has been saying in most of its decisions for more than three decades.[13]

To the contrary, there appears to be no historical evidence that the first amendment was intended to preclude all Federal governmental aid to religion when it was provided on a nondiscriminatory basis. Nor does there appear to be any historical evidence that the first amendment was intended to provide for an absolute separation or independence of religion and the national state. The actions of the early Congresses and Presidents, in fact, suggest quite the opposite.

For a few moments, permit me to contrast the Court's views with fact. Item: in 1971, in *Lemon* v. *Kurtzman*, Chief Justice Burger said for the court that, "[W]e have no long history of state aid to church-related educational institutions. . . ."[14]

If the Court believes that, how would it explain the hundreds of thousands of Federal tax dollars spent in support of Indian church schools until Congress altered the policy by statute in 1896? [15]

How would the Court explain the fact that during 1824 to 1831, only 7 years, the "Annual Reports of the Commissioner of Indian Affairs" indicate that U.S. tax dollars supported church schools run by the Society of the United Brethren, the American Board of Foreign Missions, the Baptist General Convention, the Hamilton Baptist Missionary Society, the Cumberland Missionary Society, the Synod of South Carolina and Georgia, the United Foreign Missionary Society, the Methodist Episcopal Church, the Western Mis-

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366 U.S. 420 (1961); *Engel* v. *Vitale*, 370 U.S. 421 (1962), 392 U.S. 236 (1963); *Bd. of Ed.* v. *Allen*, 392 U.S. 236 (1968); *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973).

[12] See n. 6, supra.

[13] Cord, "Separation, op. cit.," Chapter two, three, seven and eight.

[14] *Lemon* v. *Kurtzman*, 403 U.S. 622 (1971), p. 626.

[15] "The Statutes at Large of the United States of America," XXIX (Washington, DC; Government Printing Office, 1897), Fifty-Fourth Congress, Sess. I, Chap. 398, 1896, "Support of Schools", p. 345.

sionary Society, the Catholic Bishop of New Orleans, the Society for Propagating the Gospel Among the Indians, the Society of Jesuits, the Protestant Episcopal Church of New York, the Methodist Society, and the Presbyterian Society for Propagating the Gospel?[16]

Chief Justice Burger is in error. In fact, the converse is true. We have had a long history of supporting church schools, and that policy was changed not because it was unconstitutional, but because Congress no longer thought it was desirable public policy.

The fact that these schools were almost exclusively Indian schools is constitutionally irrelevant. If the first amendment absolutely forbids the use of tax dollars to support church schools, the race or culture of the pupils attending these schools is not constitutionally important.

Item: attributing to Jefferson and Madison an absolute separationist view, the Court frequently documents its interpretation of those gentlemen with reference to Jefferson's Virginia "Bill for Establishing Religious Freedom."

Madison introduced this bill in 1785 as Jefferson's surrogate,[17] and it did become law in 1786 by act of the Virginia State Assembly.[18] However, the Court neglects to tell us that on the same day, October 31, 1785, Madison also introduced a bill, again attributed to Jefferson, which severely fined "Sabbath Breakers."[19] This, too, became law in 1786.[20] Does this Jefferson legislation represent a high and impregnable wall of separation of church and state?

Senator HATCH. Well, does that show how out of step Jefferson was with our modern-day constitutional theories?

Professor CORD. Item: In 1803, as President, Thomas Jefferson submitted to the U.S. Senate a proposed treaty with the Kaskaskia Indians which included a clause pledging the United States to build a Roman Catholic church and providing a yearly stipend for its priest.[21] Is this absolute separation of church and state?

After the treaty was ratified, Jefferson asked the Congress to act in its "legislative capacity" to meet the treaty obligations.[22] I would like to ask the Supreme Court, when Congress appropriated the U.S. tax dollars to build that Roman Catholic church, did it pass a law respecting an establishment of religion?

Item: Most recently the U.S. Senate and House chaplaincies have been assailed in Federal court as unconstitutional.[23] James Madison was one of the six members of the committee of the first Congress which recommended the congressional chaplain system.[24]

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[16] "Annual Reports of the Commissioner of Indian Affairs:" 1824–1831, I (New York: A.M.S. Press, Inc., 1976).

[17] Julian P. Boyd, ed., "The Papers of Thomas Jefferson," II, 1777 to June 18, 1779, including "The Revisal of the Laws, 1776–1786" (Princeton, NJ: Princeton University Press, 1950), p. 307.

[18] Ibid., pp. 545–47.

[19] Ibid., pp. 555–56.

[20] Ibid., see notes, pp. 555–556.

[21] Richard Peters, Esq., ed., "The Public Statutes at Large of the United States of America," VII (Boston: Charles C. Little and James Brown, 1848), pp. 78–79. Specifically, see Article Three of the proposed treaty.

[22] James D. Richardson, "A Compilation of the Messages and Papers of the Presidents 1789–1897," I (Washington, DC: Bureau of National Literature and Art, 1901), p. 365.

[23] *Murray, et al.* v. *Morton, et al.*, 505 F. Supp. 144 (1981).

[24] *Report of the House of Representatives*, First sess. of the Thirty-Third Congress, in three vols. (Washington: A.O.P. Nicholson, Printer, 1854), II, House of Representatives Document 124, "Appointment of Chaplains", p. 4.

Their recommendation was adopted and an annual salary of $500 for public prayers in the Congress was provided by the very same Congress which proposed the establishment clause.[25] Is this absolute separation of church and state? To advocates of absolute separation, obviously the first Congress did not know what the first amendment, which they authored, meant.

Item: beginning in 1796 and culminating in 1804, the Congress of the United States passed laws which, in effect, paid with enormous land grants in trust an evangelical Christian sect to spread and maintain the gospel among Indians in the Ohio Territory.

One of those laws was signed by George Washington,[27] two by John Adams,[26] and the last three by the third President of the United States. In 1802, 1803, and 1804, Thomas Jefferson, who refused to issue Thanksgiving Day proclamations because he thought they were unconstitutional, signed into law congressional enactments providing land for the "Society of the United Brethren for Propagating the Gospel among the Heathen."[28]

Is this a high and impregnable wall of separation between church and state? Apparently, Jefferson did not think those laws were unconstitutional, or else we are logically forced to believe that he was a rascal, sitting in the White House trying to destroy a principle which he fought so devotedly for—separation of church and state.

No. In my opinion, Jefferson, Madison, Washington, Adams, their Congresses, et al., were not rascals trying to destroy a principle that they themselves had enshrined in the Constitution.

For them, the use of religious or sectarian institutions, including prayers, as means to reach secular ends was not a violation of the first amendment unless, and only unless, preferential treatment was given one church, one religion, or one religious sect, thus elevating it into a preferred legal status.

THE FIRST AMENDMENT TRADITION AND SENATE JOINT RESOLUTION 3

Specifically, how do these principles of church-state separation relate to a prayer amendment? Discussing the *Engel* prayer case,[29] along with *Abington*[30] *and Murray* v. *Curlett*[31] in "Separation of Church and State," I argued that the noncoercive daily recitation of the New York State Regent's prayer did not violate the 1st and 14th amendments, but daily Bible reading and recitation of the "Lord's Prayer" did.[32]

For me, the Regent's prayer, which merely addressed itself to "Almighty God,"[33] no more placed a particular religion or religious tradition into a preferred legal status than did James Madison's four Thanksgiving Day proclamations, replete with their references to the "Great Parent and Sovereign of the Universe," the "Benefactor of Mankind," the "Holy and Omniscient Being," as well as "Almighty God." [34]

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[25] Ibid.

[26] "Public Statutes at Large," I, "Acts of the Fourth Congress", Sess. I, Chap. 29, pp. 464-69, approved by President Washington, June 1, 1796.

[27] Ibid., "Acts of the Fifth Congress", Sess. III, Chap. 29, pp. 724 approved by President John Adams, March 2, 1799; id., II, "Acts of the Sixth Congress", Sess. I, Chap. 13, pp. 14-16, approved by President John Adams, March 1, 1800.

[28] Ibid., II, "Acts of the Seventh Congress", Sess. I, Chap. 30, pp. 155-156, approved by President Jefferson, April 26, 1802; id., II, "Acts of the Seventh Congress, Sess. II, Chap. 30, pp. 236-237, approved by President Jefferson, March 3, 1803; id., II, "Acts of the Eighth Congress", Sess. I, Chap. 26, pp. 271-72, approved by President Jefferson, March 19, 1804.

[29] 370 U.S. 421 (1962).

[30] 374 U.S. 203 (1963).

[31] Ibid.

[32] Cord, "Separation, op. cit.," pp. 160-165.

[33] *Engel* v. *Vitale*, 370 U.S. 421, at 422.

Dissimilarly, daily Bible reading and/or recitation of the New Testament's Lord's Prayer, in my judgment, elevated the Judeo-Christian or Christian religious traditions, respectively, into a legally preferred status forbidden by the first amendment.[35]

A prayer amendment which is so open-ended as to constitutionally sanction all public school group prayers, even a religiously partisan one, conducted by public schoolteachers clearly departs from our first amendment heritage.

Unlike the prayer in *Engel* v. *Vitale,* which simply made reference to "Almighty God," a daily school prayer under the present proposal in Senate Joint Resolution 73 could be addressed to the "Lord Jesus" or the "God of our Fathers, Abraham, Isaac and Jacob." For this reason, the wording of the proposed amendment in Senate Joint Resolution 73 greatly concerns me.

As I said at the outset, I am here to urge that you take care not to violate the historic meaning of the American principle of separation of church and state. If a constitutional amendment merely provided for a moment of silence or a religiously nonpartisan prayer, the spirit of the establishment clause, in my judgment, would not be violated.

Any connection of an exclusive school prayer with a particular religious tradition would put that tradition into a legally preferred position—a happening which I believe the Founding Fathers sought to preclude with the first amendment.

Mr. Chairman and members of the staff, thank you for inviting me to be part of this constitutional process. I would be happy to respond to any questions that you have.

Senator HATCH. Thank you, Professor Cord. In reading your book, I note that there was a definite conflict between the Federalists and the anti-Federalists over States' rights. Could you briefly summarize this conflict for the committee and describe how it led to the wording of the establishment clause as we know it today?

Professor CORD. Well, I think there was concern, Mr. Chairman, that the establishment clause would be so worded as to deprive the States of the opportunity of dealing with religious establishments and religious institutions as they saw fit.

There was also a general feeling and debate about the notion that an establishment clause was really not necessary because the Federal Government was one of delegated powers, and no powers involving religion had been delegated to the Federal Government. Therefore, there was no need to put a prohibition on the actions of the Federal Government in the Bill of Rights. There was some concern about that.

At the time of the debate regarding the first Thanksgiving Day proclamation, there was debate in the Congress not over whether such a proclamation would be unconstitutional, but whether or not the Federal Government was the Government that should issue the proclamation as opposed to the governments of the several States.

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[34] See President Madison's proclamations of 1812, 1813, and 1814 as reprinted in Cord, "Separation, op. cit.," pp. 257–260.

[35] See n. 32, supra.

Of course, Mr. Chairman, as you know, there were several States which had religious establishments. The last to be disestablished was the Congregationalist Church in Massachusetts in 1833. So, the States were very much concerned that the first amendment not interfere with their religious establishments and that they could continue those establishments or do away with them as they saw fit.

I hope that is a meaningful response.

Senator HATCH. Thank you, How was the 14th amendment intended to affect religion? Was it intended to change the meaning of the first amendment?

Professor CORD. Mr. Chairman, if you have read "Separation of Church and State," I have tried to skirt the 14th amendment incorporation controversy. I have done that for two reasons. Let me put the most important one first.

I have spent a lot of time researching in the primary documents the intent of the framers in regard to the establishment clause. As you know, there is a great controversy in our land, and there has been ever since Justice Black in a dissenting opinion in 1942 indicated for the modern Court that the 14th amendment intended to incorporate all of the Bill of Rights.

I have not researched very thoroughly the history behind the debates in regard to the 14th amendment and its being a vehicle for applying against the States all the prohibitions of the Bill of Rights.

I think Raoul Burger, in "Government by Judiciary," has done a great job in expressing one point of view. As you know, there is legal scholarship on the other point of view. I would, therefore, decline as really not much of an expert in all of the history of that controversy.

The second reason is, Mr. Chairman, less noble. I think in this book I bit off an awful lot to chew, and I wanted to address myself to the establishment clause and not get into that other controversy.

Senator HATCH. All right. What are the factors, in your opinion, chiefly responsible for the Supreme Court having gone so far astray from the original intentions of the Founding Fathers with regard to the first amendment establishment clause?

I would also like you to identify for us what, in your opinion, are the major interpretive errors, which have been committed by the Court.

Professor CORD. I think, Mr. Chairman, in this area there has been a lot of scholarship which has been misleading. I think that I was truly shocked when I found so much documentation for a different interpretation of the establishment clause than the interpretation given by the scholars for virtually an absolute separationist principle. I think the most prominent and outstanding scholar of that school of thought is Prof. Leo Pfeffer, and "Church-State and Freedom," his major book, is critiqued rather extensively in the second and third chapter of "Separation of Church and State."

Scholarship, I think, in part which is misleading found its way into all of the legal briefs, and I think the Justices embraced that scholarship and I would hope to believe they embraced it in good faith.

To give you an illustration of just how far astray good scholarship may have gone, or allegedly good scholarship, the "Guide to the United States Supreme Court" published by the Congressional Quarterly in 1979 is a very well-respected document, and you can find on its cover ample statements by renowned scholars and lawyers of every kind of political persuasion,

Out of curiosity one day, I just flipped to the section on the establishment clause to see what was there and I came across this paragraph in the opening on the section of the establishment clause.

> The two men most responsible for its inclusion in the Bill of Rights construed the Clause absolutely. Thomas Jefferson and James Madison thought that the prohibition of establishment meant that a Presidential proclamation of Thanksgiving Day was just as improper as a tax exemption for churches.

James Madison issued four discretionary Thanksgiving Day proclamations. One reading this would think that as President, he thought they were unconstitutional. Thomas Jefferson, in 1802, signed a law providing for tax exemption of churches in the Federal District of Columbia.

So, Mr. Chairman, with scholarship like this which I, of course, do not take as insidious with intention to lead the reader astray, I think this was written in good faith. I think that what happens, unfortunately, is that when one is putting together a great tome on a great subject, you look to the experts and you do not look to the primary documents.

If the experts say something which is misleading, then, of course, that misleading notion gets passed along. I think the U.S. Supreme Court has been misled; I think they have been misled greatly. I think that if the record is presented to them and if they read it, we will find whether they have, in fact, been misled or, in fact, they are rendering decisions which are justified by history which is really nonhistory.

Senator HATCH. I hope that we will find that your scholarship will be cited in some of the Supreme Court footnotes in the near future. That would be a pleasant change.

Is it possible to allow school prayer under any circumstances where there is absolutely no preference whatsoever shown to any religious doctrine or authority?

Professor CORD. Yes; a nondiscriminatory prayer, such as the prayer in the *Engel* case, as I said in my statement, in my judgment does not violate the spirit of the first amendment. Therefore, such an amendment, if added to the Constitution, in my judgment, would not violate the spirit of the first amendment.

Senator HATCH. What ought to be the legal or constitutional significance of Christmas carols in the schools or Nativity scenes or Christmas wreaths or things like that?

Should we attempt to address these issues legislatively, and if so is there any reasonable way to distinguish these sorts of practices from more serious involvement by the State in essentially religious activity?

Professor CORD. I think, Mr. Chairman, if the purpose is secular—and the purpose may very well be secular in the sense of producing a variety of displays at important religious festivals in public places as a manifestation of our culture—if that might be the secular purpose, I do not see the means—the establishment of the nativity scene or whatever other kind of sectarian display there might be—as necessarily violating the first amendment.

However, if this is only done for members of the Christian faith and the public places where that nativity scene was displayed are not, in good faith, available for the display of any other religious tradition, then I believe that would have the effect of placing the Christian tradition into a preferred position.

The availability to other religious groups, I think, is the key if we are not going to have preferential treatment which carries the trademark of religious establishments.

Senator HATCH. What about the display of the Ten Commandments in a classroom?

Professor CORD. I would say that the display simply of the Ten Commandments, in my judgment, would be unconstitutional. But if the Ten Commandments was diplayed with displays from perhaps the "Koran," Mary Baker Eddy's "Key to the Scriptures," the "Talmud," the "Book of Mormon," "Analects of Confucius," or any other religious group that chose to have some displays, I think that, of course, would not be preferential treatment, and I do not think the first amendment precludes religious displays—only preferential religious displays.

Senator HATCH. Thank you, Professor Cord. We appreciate your testimony here today and your excellent book. I would like to get my copy autographed, so before you leave if you would do that for me, I would appreciate it.

Professor Cord. Thank you very much, Mr. Chairman.

Senator HATCH. We appreciate your taking the time to be with us.

[Chapter 1, from Mr. Cord's book, "Separation of Church and State: Historical Fact and Current Fiction," follows:]

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Separation of Church and State:

Historical Fact and Current Fiction

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Lambeth Press
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Chapter One

The Genesis Of the Establishment Of Religion Clause

The story of the settlement of the New World in the early seventeenth century provides much of the historical background from which flowed the great guarantees of freedom of religion expressed in the First Amendment. A little more than a century before the first settlement appeared at Jamestown, the unity of the Western Christian world had been destroyed by the inception of the Protestant Reformation. The great nations of western Europe had become internally divided owing to the allegiances of different princes to different Christian codes. Many national schisms were resolved forcefully by the institution of established religions and the suppression of minority sects. Generally the reigning monarch's faith became the established faith of the state. Because of the vast political power held by the German princes or electors, the established religion in each province of the Holy Roman Empire was determined by the ruling elector.

A great many of the early American settlements were formed by dissident religious minorities fleeing from the Protestant establishments of England, Ireland, and Scotland. Paradoxically many Europeans who fled to the New World to escape established religion agreed that Church and State should be combined in their new settlements. With few exceptions, those who fled religious persecution were no more tolerant of religious dissenters than were those from whom they had fled. Thus, established churches became the order of the day in early America.[1]

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[1] For a general discussion of the early development of religious establishments in the North American Colonies, see Anson Phelps Stokes and Leo Pfeffer, *Church and State in the United States*, rev. ed. in 1 vol. (New York: Harper and Row, 1964), chap. 1, pp. 3-29; and Leo Pfeffer, *Church, State, and Freedom*, rev. ed. (Boston: Beacon Press, 1967), chap. 3, pp. 71-90.

SEPARATION OF CHURCH AND STATE

At the outbreak of the American Revolution in 1775, there were established churches in nine of the thirteen colonies.[2] The Anglican Church had been established in Virginia in 1609, in New York's lower counties in 1693, in Maryland in 1702, in South Carolina in 1706, in North Carolina nominally in 1711, and in Georgia in 1758.[3] The Congregational Church was established in Massachusetts, Connecticut, and New Hampshire.[4] By the time that the Constitutional Convention assembled in Philadelphia in the summer of 1787, however, only Georgia, South Carolina, Connecticut, Massachusetts, and New Hampshire had retained their religious establishments.[5] The Anglican Church had been disestablished in Virginia in 1786, and in New York, Maryland, and North Carolina during the Revolutionary War.[6] The elimination of established churches in the several States continued after the ratification of the Federal *Constitution* in 1788 and culminated in the disestablishment of the Congregational Church in Connecticut in 1818,[7] in New Hampshire in 1819,[8] and in Massachusetts in 1833.[9]

For those in the new United States who were concerned about the union of Church and State at the level of the national government the activities of James Madison and Thomas Jefferson in disestablishing the Anglican Church in Virginia provided a useful legacy. Madison's "Memorial and Remonstrance Against Religious Assessments," written in 1785 in opposition to the use of Virginia's public funds to pay teachers of the Christian religion,[10] and Jefferson's "Bill for Establishing Religious Freedom" in

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[2] Stokes and Pfeffer, *Church and State*, pp. 36–37.

[3] Richard B. Morris, ed., *The Encyclopedia of American History*, Bicentennial ed. (New York: Harper and Row, 1976), p. 820.

[4] Stokes and Pfeffer, *Church and State*, p. 37.

[5] Morris, *The Encyclopedia of American History*, p. 824.

[6] Ibid., p. 824; and Samuel Eliot Morison, *The Oxford History of the American People* (New York: Oxford University Press, 1965), p. 293. There is disagreement as to when Maryland, Georgia, and South Carolina disestablished the Anglican Church. Stokes and Pfeffer (p. 37) claim that these States continued their establishments through 1787, while Morison (p. 293) claims that the Anglican Church was disestablished in "Maryland and the Carolinas" during the war. Morris (p. 820) has the Georgia establishment abolished in 1789, while Stokes and Pfeffer (p. 37) have it ended during the war. These discrepancies may be due to different criteria used to make the judgment as to when disestablishment was accomplished.

[7] Morris, *The Encyclopedia of American History*, p. 824.

[8] William H. Harris and Judith S. Levey, eds., *The New Columbia Encyclopedia* (New York: Columbia University Press, 1975), p. 1922.

[9] Morris, *The Encyclopedia of American History*, p. 824.

[10] Saul K. Padover, ed., *The Complete Madison* (New York: Harper and Brothers, 1953), pp. 299–306.

Virginia, proposed in 1779 and enacted in 1786,[11] were immensely important documents to disestablishmentarians who urged the separation of Church and State. Both documents would be invoked more than 150 years later when in 1947 the United States Supreme Court first comprehensively interpreted the "Establishment of Religion" Clause of the First Amendment.[12]

The religious guarantees of the First Amendment to the *U.S. Constitution* provide that: "Congress shall make no law respecting *an establishment of religion* or prohibiting the free exercise thereof;..."[13] The Amendment as written expresses two distinct constraints on the federal state's involvement in religion—one concerns religious establishments and the other the individual's free exercise of religion. The thesis advanced here is that placed in their historical context—with due consideration to the *words and actions* of the initial framers of this Amendment, to the Congress that proposed it to the States, to the States that made it part of the *Constitution*, and to the United States Government bound by it—the two religious prohibitions of the First Amendment were designed to establish a separation of Church and the national State. This separation was to be ensured by denying to Congress the constitutional authority to pass legislation providing for the formal and legal union of any single church, religion, or sect with the Federal Government. Thus the preferential status of one church, religion, or sect—elevating it to an exclusive governmental position of power and favor over all other churches or religious denominations—would be prevented. In addition, this concept of separation of Church and the national State would constitutionally prohibit Congress from interfering with any individual's religious convictions. Consequently the separation of Church and the national State envisioned by the adopters of the First Amendment would leave the matter of religious establishments or disestablishment to the wisdom of the several States.

The words that the First Congress eventually shaped into the First Amendment and its "Establishment" Clause were proposed by James Madison in the House of Representatives on June 8, 1789.[14] Madison—

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[11] Saul K. Padover, ed., *The Complete Jefferson* (Freeport, New York: Books for Libraries Press, 1969), pp. 946–49.

[12] *Everson v. Board of Education*, 330 U.S. 1 (1947).

[13] This Amendment, passed by Congress on September 25, 1789 and ratified by three-fourths of the States, went into effect December 15, 1791. Emphasis added.

[14] *Annals of the Congress of the United States, The Debates and Proceedings in the Congress of the United States*, Vol. I, Compiled from Authentic Materials, By Joseph Gales, Senior (Washington: Gales and Seaton, 1834), p. 434; hereafter referred to as *Annals of the Congress*.

is aware that several States had ratified the new *Constitution* with the understanding that a series of Constitutional amendments would safeguard certain human rights from encroachment by the national government—called upon the First House of Representatives to act with swiftness tempered by reasonable care. Madison feared that undue delay in proposing that a "Bill of Rights" be added to the recently adopted *Constitution* might lower the credibility of the new central government. Referring to the unenthusiastic constitutional ratification of several States, he told his colleagues in the First House of Representatives that their constituents

> . . . may think we are not sincere in our desire to incorporate such amendments in the Constitution as will secure those rights, which they consider as not sufficiently guarded. The applications for amendments come from a very respectable number of our constituents, and it is certainly proper for Congress to consider the subject, in order to quiet that anxiety which prevails in the public mind. Indeed, I think it would have been of advantage to the Government if it had been practicable to have made some propositions for amendments the first business we entered upon; it would have stifled the voice of complaint, and made friends of many who doubted the merits of the Constitution. Our future measures would then have been more generally agreeably supported; but the justifiable anxiety to put the Government into operation prevented that; it therefore remains for us to take it up as soon as possible. I wish then to commence the consideration at the present moment; I hold it to be my duty to unfold my ideas, and explain myself to the House in some form or other without delay. I only wish to introduce the great work, and, as I said before, I do not expect it will be decided immediately; but if some step is taken in the business, it will give reason to believe that we may come to a final result. This will inspire a reasonable hope in the advocates for amendments, that full justice will be done to the important subject; and I have reason to believe their expectation will not be defeated. . . .[15]

Although several of the State Ratifying Conventions urged the protection of diverse individual rights, amendments guaranteeing freedom of religion were commonly suggested. These suggestions clearly indicated that the States wanted to prevent the establishment of a national religion or the elevation of a particular religious sect to preferred status as well as to prohibit interference by the national government with an individual's freedom of religious belief. For example, the Maryland Ratifying Convention proposed an amendment stating: "That there be *no national religion established by law*; but that all persons be equally entitled to protection in their religious liberty."[16] The Virginia Ratifying Convention proposed a "Declaration or Bill of Rights" as amendments to the *Constitution*, of which Article Twenty (adopted on June 27, 1788) stated:

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[15] Ibid., p. 427.

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and that *no particular religious sect or society ought to be favored or established, by law, in preference to others.*[17]

The New York Convention similarly declared:

> That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience; and that *no religious sect or society ought to be favored or established by law in preference to others.*[18]

Resolutions passed by the North Carolina and Rhode Island Conventions echoed Virginia's "Bill of Rights."[19]

Madison's original wording of the Establishment of Religion Clause also supports my thesis concerning the separation of Church and the national State: "The Civil rights of none shall be abridged on account of religious belief or worship, *nor shall any national religion be established*, nor shall the full and equal rights of Conscience be in any manner, or on any pretext, infringed."[20] After the lengthy discussion the House essentially referred Madison's religious proposals—and all of the many other prohibitions restricting the national government that he sought to be put into the *Constitution*—to a "Committee of the Whole on the state of the Union."[21] Ultimately on July 21, the House of Representatives voted to establish a Select Committee empowered to consider the subject of Madison's proposed constitutional amendments and to report back to the full House.[22] Madison was appointed one of the Committee's members.[23]

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[16] Jonathan Elliott, *Debates on the Federal Constitution*, Vol. II (Philadelphia: J.B. Lippincott Co., 1901), p. 553. Emphasis added.

[17] Ibid., Vol. III, p. 659. Emphasis added.

[18] Ibid., Vol. I, p.328. Emphasis added.

[19] Ibid., Vol. I, p. 334; Vol. IV, p. 244.

[20] *Annals of the Congress*, Vol. I, p. 434. Emphasis added.

[21] Ibid., Vol. I, p. 450.

[22] Ibid., pp. 664–5.

[23] Ibid., p. 665. The other members of the House appointed to the Select Committee were Messrs. Vining, Baldwin, Sherman, Burke, Gilman, Clymer, Benson, Goodhue, Boudinot and Gale.

Interestingly, however, Madison believed that the religion amendment was not really necessary to prevent the Federal Government from establishing a national religion for he considered the national government to be merely one of delegated powers. In his judgment the general government could not legislate in this field since no power to establish a national religion had been delegated to it. Madison expressed this view before the Virginia Convention on June 12, 1788, prior to its ratification of the *Constitution*:

> Fortunately for this Commonwealth, a majority of the people are decidedly against *any exclusive establishment*—I believe it to be so in the other states. *There is not a shadow of right in the general government to intermeddle with religion.* Its least interference with it, would be a most flagrant usurpation. I can appeal to my uniform conduct on this subject, that I have warmly supported religious freedom. . . . The United States abound in such a variety of sects, that it is a strong security against religious persecution, and it is sufficient to authorize a conclusion, that no one sect will ever be able to outnumber or depress the rest.[24]

When one examines the texts of the resolutions offered at the State Ratifying Conventions and the original Madison draft of the Establishment Clause, it becomes obvious, on their face, that they are concerned with preventing the Federal Government from establishing a national religion or raising one religion above the others.

Another concern of the State Ratifying Conventions was to protect freedom of conscience in religious matters. This issue is also evident in Madison's draft resolution submitted to the House. On a motion by Fisher Ames of Massachusetts, the House, acting as a "Committee of the Whole," on August 20, 1789, altered Madison's draft proposal to read: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."[25] Essentially, the House adopted Ames's versions of the "Establishment" and "Free Exercise" Clauses, which were sent to the Senate where they underwent further revisions.[26]

The Senate version that initially emerged from debate on September 3, 1789, was: "Congress shall make no law establishing one religious sect or society in preference to others, or to infringe on the rights of conscience."[27]

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[24] Padover, *The Complete Madison*, p. 306. Emphasis added.

[25] *Annals of the Congress*, Vol. I, p. 766.

[26] For an excellent detailed report and analysis of the debates in the House and Senate regarding the Establishment Clause, see Michael J. Malbin, *Religion and Politics, The Intentions of the Authors of the First Amendment* (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1978).

[27] Ibid., p. 12.

By the end of the day's deliberation, however, the Senate through further amendments had changed the Clauses to read: "Congress shall make no law establishing religion, or prohibiting the free exercise thereof."[28] After further Senate debate on September 9, 1789, the Senate version which was sent back to the House ultimately read: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion."[29]

The conference committee for the Bill of Rights included Madison and Roger Sherman of Connecticut, among others from the House, and a contingent from the Senate. The committee reported the "Establishment" and "Free Exercise" Clauses in their current form in the First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This compromise language was accepted by the House on September 24, 1789, and by the Senate the following day.[30]

The words "respecting" and "establishment" are key terms in the Establishment Clause and should therefore be examined further. The word "respecting," which is synonymous with "concerning, regarding, about, anent," indicates that the First Amendment did not prohibit an establishment of religion; rather it prohibited Congress from making any law about, concerning, or regarding an establishment of religion. Since a national religious establishment did not exist at the time of the Amendment, it became unconstitutional to provide one after ratification.

As documented above, Madison took this position before the Virginia Convention on June 12, 1788. Ironically, Roger Sherman of Connecticut, when debating Madison in the House of Representatives, questioned the need for an Establishment of Religion Clause on this same Madison premise. On August 15, 1789, the debate in the House records that "Mr. Sherman thought the Amendment altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the Constitution to make *religious establishments*; . . ."[31]

Madison's reply makes clear that some in the States feared that the "Necessary and Proper" Clause of Article I Section 8 might be used to "establish a religion."[32] Without doubt, Madison's retort to Sherman indicates that at that time in his career, Madison, the initial proponent of what eventually became the Establishment Clause, took the word "establishment" to mean a governmental religion such as a state church.

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[28] Ibid., pp. 12–13.

[29] Ibid.

[30] Ibid., pp. 13–14.

[31] *Annals of the Congress*, Vol. I, p. 730. Emphasis added.

[32] U.S. *Constitution*, Art. I Sec. 8. The last paragraph provides the Congress with the power:

> To make all laws which shall be necessary and proper for carrying into execution the foregoing powers [all the enumerated powers of the Congress in Article I Section 8], and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

> Mr. Madison said, he apprehended the meaning of the words to be, that Congress should *not establish a religion, and enforce the legal observation of it by law*, nor compel men to worship God in any manner contrary to their conscience. Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the Constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the Constitution, and the laws made under it, enabled them to make laws of such a nature as *might infringe the rights of conscience, and establish a national religion; to prevent these effects he presumed the amendment was intended*, and he thought it as well expressed as the nature of the language would admit.[33]

Despite the clarity, that the concern of those who framed the Establishment Clause was addressed to the possible imposition of a *single church or religion* by the Federal Congress, an argument still noted and/or advanced by some scholars is that the European model of a constitutional single established religion *was not* what was feared by the "Fathers" of the First Amendment. This argument has been succintly summarized as follows:

> The phrase "establishment of religion" must be given the meaning that it had in the United States in 1791, rather than its European connotation. In America there was no establishment of a single church, as in England. Four states had never adopted any establishment practices. Three had abolished their establishments during the Revolution. The remaining six states—Massachusetts, New Hampshire, Connecticut, Maryland, South Carolina, and Georgia—changed to comprehensive or "multiple" establishments. That is, aid was provided to all churches in each state on a nonpreferential basis, except that the establishment was limited to churches of the Protestant religion in three states and to those of the Christian religion in the other three states. Since there were almost no Catholics in the first group of states, and very few Jews in any state, this meant that the multiple establishment practices included every religious group with enough members to form a church. It was this nonpreferential assistance to organized churches that constituted "establishment of relig-

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[33] *Annals of the Congress*, Vol. I, p. 730 Emphasis added.

> ion" in 1791, and it was this practice that the Amendment forbade Congress to adopt.[34]

Assuming, but not conceding, the validity of this broad interpretative statement about American religious establishments, this pluralistic view of the concept of established religion cannot, for the following reasons, be reconciled with the historical facts that brought the Establishment Clause into existence.

First, the resolutions of the State Constitutional Ratifying Conventions from Maryland, Virginia, New York, North Carolina, and Rhode Island, understood in their historical context, all urged a constitutional amendment prohibiting *a single national religious establishment.*[35]

Second, in response to these State Ratifying Convention's requests, James Madison introduced his original draft of the Establishment Clause which on its face is clearly designed to foreclose a national religion, *not religions*.

Third, Madison's interpretation given to Roger Sherman during the House's August 15, 1789 debate as to what the House's Select Committee's Report meant (regarding its recommended prohibition "that no religion shall be established by law") indicates clearly that Madison believed Congress was being denied the power to "establish a national religion" *not religions*.[36]

Fourth, the final wording of the religious clauses of the First Amendment—"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof"—shows the intent to prevent a single and not some pluralistic national religious establishment. As Michael J. Malbin has noted:

> Had the framers prohibited "*the* establishment of religion," which would have emphasized the generic word "religion," there might have been some reason for thinking they wanted to prohibit all official preferences of religion over irreligion. But by choosing "an establishment" over "the establishment," they were showing that they wanted to prohibit only those official activities that tended to promote the interests of one or another particular sect.

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[34] C. Herman Pritchett, *The American Constitution*, 3rd ed. (New York: McGraw-Hill; 1977), p. 401. This pluralistic interpretation of American "established churches" appears to be at odds with Morris, *The Encyclopedia of American History*, and Morison, *The Oxford History of the American People*, both of which indicate, that for the most part, single "establishments" existed in the States which had established churches. See also Pfeffer, *Church, State, and Freedom*, p. 73.

[35] See the text at fns. 16–19, supra.

[36] See the quote in the text at fn. 33, supra.

> Thus, through the choice of "an" over "the," conferees indicated their intent. The First Congress did not expect the Bill of Rights to be inconsistent with the Northwest Ordinance of 1787, which the Congress reenacted in 1789. One key clause in the Ordinance explained why Congress chose to set aside some of the federal lands in the territory for schools: "Religion, morality, and knowledge," the clause read, "being necessary to good government and the happiness of mankind, schools and the means of learning shall forever be encouraged." This clause clearly implies that schools, which were to be built on federal lands with federal assistance, were expected to promote religion as well as morality. In fact, most schools at this time were church-run sectarian schools.[37]

On the basis of the resolutions from the Ratifying Conventions in Maryland, Virginia, New York, North Carolina, and Rhode Island, the original Madison text concerning religious prohibitions placed on national governmental power in the First Amendment, and Madison's own interpretation during debate in the House of Representatives of the prohibitions concerning religion, I conclude that Madison and the other supporters of these prohibitions wished to deny Congress the power to establish a national religion. Congress was to have no power to elevate by law any religion or religious sect to a preferred status, and it was barred from interfering with individual liberty of religious conscience. These limiting principles of the First Amendment are also supported by the early and widely respected scholars of the Federal *Constitution*, Joseph Story and Thomas McIntyre Cooley.[38]

An Associate Justice of the United States Supreme Court from 1811 to his death in 1845 and concurrently a professor at the Harvard Law School from 1829, Story presented in his multivolume work on the *Constitution* an authoritative statement of attitudes toward the religious prohibitions of the First Amendment during the early days of the Republic, when "flesh" was being put on the "skeleton" that was the *Constitution*. Appointed by Madison to the Supreme Court, Justice Story held substantially the same view of the religion clauses of the First Amendment as did the former President when Madison was the Amendment's initial author and champion in the House debates. Story's *Commentaries* saw the First Amendment as prohibitive of a Federal establishment of a national Church or the official preference of a particular religion or religious sect, but not hostile to the encouragement of religion:

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[37] Malbin, *Religion and Politics*, pp. 14–15.

[38] "With Story, he [Cooley] ranks as the most influential commentator on the Constitution." Morris, *The Encyclopedia of American History*, p. 1005.

> The real difficulty lies in ascertaining the limits to which government *may rightfully go in fostering and encouraging religion. . . .*[39]
>
> Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration [First Amendment], the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the State so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.[40]
>
> The real object of the First Amendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; *but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution (the vice and pest of former ages), and of the subversion of the rights of conscience in matters of religion* which had been trampled upon almost from the days of the Apostles to the present age. . . .[41]

Like Story, Cooley did not consider that the First Amendment, or even state constitutions mandated absolute separation of Church and State. Citing many activities by which the state was aiding religion, Cooley saw no violation of any American constitutional principle as long as the national government treated all religions equally. In *Constitutional Limitations*, first published in 1868, Cooley warned that exclusive aid to a particular religious denomination or sect without doubt is the evil precluded by the principles of the U. S. *Constitution*. Concerning relations between the Federal and State Governments and religion, he wrote:

> But while thus careful to establish religious freedom and equality, *the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet in finite and dependent beings.* Whatever may be the shades of religious belief, all must acknowledge the

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[39] Joseph Story, *Commentaries on the Constitution of the United States*, 2nd ed., Vol. II (Boston: Charles C. Little and James Brown, 1851), Sec. 1872, p. 591. Emphasis added.

[40] Ibid., Sec. 1874, p. 593.

[41] Ibid., Sec. 1877, p. 594. Emphasis added.

> fitness of recognizing in important human affairs the superintending care and control of the Great Governor of the Universe, and of acknowledging with thanksgiving His boundless favors, at the same time that we in contrition when visited with the penalties of His broken laws. *No principle of Constitutional law is violated* when thanksgiving or fast days are appointed; when chaplains are designated for the Army and Navy; and when legislative sessions are opened with prayer or the reading of the Scriptures, or when religious teaching is encouraged by exempting houses of religious worship from the taxation for the support of State government. *Undoubtedly the spirit of the Constitution will require, in all these cases, that care be taken to avoid discrimination in favor of any one denomination or sect; but the power to do any of these things will not be unconstitutional, simply because of being susceptible to abuse. . . .*[42]

Finally, that the First Amendment originally left the entire issue of governmental involvement in religion to the States is extremely clear. When ratified in 1788, the *Constitution* contained no prohibition against individual state religious establishments; indeed, some States that ratified the *Constitution* had such religious establishments at the time of ratification, some of which continued to exist even after ratification of the First Amendment until they were ended by the States themselves (as in the case of Massachusetts which finally did so in 1833).

Supporting this view of the constitutional independence of the States in religious matters, President Thomas Jefferson in 1808 noted:

> I consider the Government of the United States as interdicted by the Constitution from meddling with religious institutions, their doctrines, discipline or exercises. This results not only from the provision that no law shall be made respecting the establishment, or free exercise, of religion, *but from that also which reserves to the States the powers not delegated to the United States*. Certainly no power to *prescribe any religious exercise, or to assume authority in religious discipline*, has been delegated to the general government. *It must then rest with the State*, as far as it can be in any human authority.[43]

Justice Story's *Commentaries on the Constitution* indicate that he also believed the First Amendment left religious establishments in the hands of the States:

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[42] Thomas M. Cooley, *Constitutional Limitations* (Boston: Little, Brown and Co., 1868), Chap. XIII, pp. 470–71. Emphasis added.

[43] Paul L. Ford, *Life of Jefferson*, Vol. 9 (Cambridge, Mass.: A.W. Elson and Co., 1904), p. 174. Emphasis added.

> It was under a solemn consciousness of the dangers from ecclesiastical ambition, the bigotry of spiritual pride, and the intolerance of sects, thus exemplified in our domestic as well as in foreign annals, *that it was deemed advisable to exclude from the national government all power to act upon the subject*. The situation, too, of the different States equally proclaimed the policy as well as the necessity of such an exclusion. In some of the States, Episcopalians constituted the predominant sect; in others, Quakers; and in others again, there was a close numerical rivalry among contending sects. It was impossible that there should not arise perpetual strife and perpetual jealousy on the subject of ecclesiastical ascendency; if the national government were left free to create a religious establishment. The only security was in extirpating the power. But this alone would have been an imperfect security, if it had not been followed up by a declaration of the right of the free exercise of religion, and a prohibition (as we have seen) of all religious tests. *Thus the whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State Constitutions*; and the Catholic and the Protestant, the Calvinist, the Armenian, the Jew and the Infidel, may sit down at the common table of the national councils without any inquisition into their faith or mode of worship.[44]

From the above documentation, I conclude that, regarding religion, the First Amendment was intended to accomplish three purposes. First, it was intended to prevent the establishment of a national church or religion, or the giving of any religious sect or denomination a preferred status. Second, it was designed to safeguard the right of freedom of conscience in religious beliefs against invasion solely by the national Government. Third, it was so constructed in order to allow the States, unimpeded, to deal with religious establishments and aid to religious institutions as they saw fit. There appears to be no historical evidence that the First Amendment was intended to preclude Federal governmental aid to religion when it was provided on a nondiscriminatory basis. Nor does there appear to be any historical evidence that the First Amendment was intended to provide an *absolute separation or independence* of religion and the national state. The actions of the early Congresses and Presidents, in fact, suggest quite the opposite.

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[44] Story, *Commentaries on the Constitution*, Sec. 1879, pp. 596–97. Emphasis added. Story relies heavily on *Lloyd's Debates*, which are frequently cited, for these conclusions.

Senator **Hatch**. Our next witness is Professor Walter Dellinger of the Duke University School of Law. This subcommittee has been very fortunate in the past to have had Professor Dellinger with us on the subject of Constitutional Convention procedures, if I recall correctly.

In my opinion, Professor Dellinger is one of the most distinguished constitutional scholars in the country. We are privileged to have you with us, Professor, and we are looking forward to hearing your testimony.

STATEMENT OF WALTER E. DELLINGER, PROFESSOR OF LAW, DUKE UNIVERSITY SCHOOL OF LAW

Professor **Dellinger**. Senator Hatch, I am delighted to be here. With the permission of the chairman, I will submit next week——

Senator **Hatch**. Could you bring the microphone a little bit closer so that everybody can hear you?

Professor **Dellinger**. Next week, I will submit a full, prepared statement addressing both the constitutional amendment in Senate Joint Resolution 73 as well as the equal access bills.

Senator **Hatch**. We will be delighted to put your statement in the record, at that time, without objection.

Professor **Dellinger**. I would like to say just a word about equal access before addressing the constitutional amendment because I think it is critically important for this committee to distinguish between those two separate issues. They present sharply different questions.

I, for one, strongly support the principle of equal access. Those wishing to engage in religious activities in public institutions, should have the same right to do so that is available to those engaging in comparable, nonreligious speech activities, and I think that that is a fundamental principle.

I am confident that the U.S. Supreme Court will certainly apply that principle at the high school level, notwithstanding what I think may be erroneous lower court decisions in the second and fifth circuits.

The *Lubbock* case is complicated. The second circuit decision, I think, is wrong. Both were decided by the lower courts before the *Widmar* decision in the U.S. Supreme Court, and I am confident that the strong 8 to 1 majority in the U.S. Supreme Court that clearly upheld the right of a Christian student group to use the State university facilities at the University of Missouri-Kansas City on the same basis as other student groups will be applied to situations such as that so eloquently described to the committee today by the impressive young witness from Lubbock.

The constitutional amendment, Senator Hatch, proposed by this administration is one which I fear would lead to government control of the content of religious exercises. The issue of government control is one which the administration has assiduously sought to avoid discussing.

The very able and distinguished Deputy Attorney General, Mr. Schmults, again avoided discussing that question this morning. I believe that if Senate Joint Resolution 73 is fully analyzed, many of those who believe that they support that amendment will not support it.

It is an amendment which would permit state officials and elected and appointed bureaucrats and politicans to compose prayers and religious liturgies and to require that those prayers be said in every school district in a State.

Senator HATCH. Would you not have the same objection to a silent prayer?

Professor DELLINGER. No. In fact, one of the virtues of a period of silent meditation is that no government official is involved in the prayer.

Senator HATCH. Yes.

Professor DELLINGER. Now, what is so troublesome about Senate Joint Resolution 73 is that several of those who testified at the hearings last summer in favor of it—Mr. Murphy, the Deputy Supreme Knight of the Knights of Columbus, and Mr. Jarman of Project Prayer—stated that they were opposed to allowing State officials to compose and draft official prayers. They did not understand this amendment to do that.

They are wrong, and I think they would not necessarily support this amendment if they were, for example, to attend to the Department of Justice's own analysis of this amendment—an analysis that the administration has attempted to avoid since last summer.

Senator HATCH. That is a good point.

Professor DELLINGER. If I could cite to you, Senator, chapter and verse from the published records of the Committee on the Judiciary hearings from last summer, a legal analysis prepared by the Office of Legal Policy of the Department of Justice and transmitted by the President of the United States—and it is published on page 109 of the 1982 hearings—says, "The determination of the appropriate type of prayer is a decision which should properly be made by state and local authorities."

On page 109 of these hearings from last summer, the 1982 hearings, the Administration recognizes that the amendment would allow "arguably sectarian prayer" to be "promoted by the state."

At page 108, the Department of Justice's legal memorandum states that, "The proposed amendment also does not specifically limit prayer in public schools and other public institutions to nondenominational prayer."

At page 104, they state, "The language of the amendment is intended to overrule *Engel* v. *Vitale*, which forbade the reading of brief state-composed prayers."

In the question and answer list provided by the White House on White House stationary dated May 6, 1982, and printed at pages 116 and 117 of the 1982 hearings, the White House said, State governments "could choose prayers that have already been written or they could compose their own prayers." Indeed, there is no way around that conclusion,

I think many well-intentioned witnesses who would like to see the availability of religious exercises on an equal basis have been confused because they look at this simple amendment and they do not see anything in the amendment which would permit State or Federal authorities to compose and mandate the nature of the prayer or the religious service.

But what the amendment does is to remove the present first amendment barrier to prayer in public schools and public institutions. By removing the first amendment barrier presently existing, power resumes in State legislatures, which have control over the schools of the State, to make whatever rules or regulations they wish.

So, for example, if this amendment is adopted and ratified by three-fourths of the States, a local school board could have a meeting of its elected officials and sit down and hammer out and compose a prayer that every school within the district in every classroom is required to recite everyday.

An individual child, I quite clearly understand, could absent himself from such an exercise. But the vice here is the composition of that prayer by school board officials.

If the State Department of Public Instruction is not satisfied with what some localities are requiring in the way of sectarian prayer, at the State level the State Department of Public Instruction could mandate its own bureaucratically composed prayer required of every school district in the State.

The administration must to acknowledge this to be so, because the very case they seek to overrule, as they expressly state, *Engel* vs. *Vitale*, involved a prayer whose vice was that it was composed by State government officials. It was composed by State officials who were politically appointed and who drafted and composed an official prayer for New York public schools.

This, I think, should be of most concern to someone who has shown the great concern about the principles of federalism that you have exhibited throughout your career in the U.S. Senate. Perhaps one ought to grab hold of one's seat before we think about the next possibility:

If this amendment is adopted, there would be nothing in the Constitution of the United States to prevent the Federal Government, through bureaucrats in the U.S. Department of Education, from conditioning all Federal funding in 38,000 school districts in the United States on those school districts engaging in a religious exercise which is composed, drafted and mandated by bureaucrats in the U.S. Department of Education.

If there were any doubt as to the plausibility of that scenario, I think that doubt is removed by the fact that that very same legislative device has been utilized in two bills which are also before this committee. I think the Hatfield bill is, on the merits, a sound bill to seek nondiscriminatory access for religious groups to school facilities on the same basis afforded to nonreligious groups.

Senator HATCH. Do you think a statute could actually enable that to happen?

Professor DELLINGER. Yes. But you will notice that you could take the Hatfield bill, which uses the link of Federal education funding, and after the passage of the constitutional amendment that is proposed by the Reagan administration, you could simply fill in the substantive provisions in a very different way,

Congress could say that future Federal funding to all 38,000 school districts is dependent upon those school districts following the religious ritual mandated by Congress, or it could simply turn that determination over to the Department of Education for the issuance of appropriate religious liturgy and approved liturgical guidelines.

Now, you know, there is a lot of debate over the original——.

Senator HATCH. Let me interrupt you for a second. For the information of those who may not have followed this issue closely, there are two statutes that have been filed. There is the Hatfield statute, which you have mentioned and there is a proposed statute filed by Senator Denton as well. These are both statutory responses to the effects of Lubbock.

Professor DELLINGER. That is right, and neither of those by any means would do what I am suggesting could be done through a statute if the constitutional amendment were passed.

Senator Hatfield's very thoughtful bill, which was originally proposed in what I thought was a very carefully done memorandum from the Christian Legal Society, is intended to insure the principle of equal access and equal opportunity, and to forbid discrimination against student-initiated, truly voluntary religious activities in the school.

I have some questions about those bills, but not on the underlying principle.

Now, the administration is obviously very concerned about the issue of who would control and compose the prayers because they seek in every way possible to avoid that issue. The Deputy Attorney General's testimony was carefully rewritten from last year to dance around their rather clear and inevitable acknowledgement that State officials could compose prayers if that amendment were adopted.

Senator HATCH. I would have to acknowledge that.

Professor DELLINGER. An example of the kind of very careful change to avoid the issue is this: where they had originaly said in the Department of Justice memorandum that State officials could determine the appropriate type of prayer, the Deputy Attorney General's very carefully worded statement this morning said that State and local authorities could determine the appropriate circumstances of prayer.

But, of course, it is inevitable; once you remove the only barrier in the Constitution that prevents a prayer from being drafted by Government officials—once you remove that by completely carving out of the Constitution all issues relating to prayer in public schools and other public institutions, then whoever is in charge of the premises, whatever level of government has ultimate authority to make determinations about that public institution or public school, then has a constitutional carte blanche to draft and determine whatever the prayer will be.

Senator HATCH. Let me interrupt you on that point.

Professor DELLINGER. Yes.

Senator HATCH. I really think you are doing the committee a great service in pointing that out. I feel the same way. We have to resolve that issue in this subcommittee in determining the wording of this proposed constitutional amendment.

I agree with you that the administration witnesses have carefully skirted the issue of who will compose the prayer.

Professor DELLINGER. My colleague, William Van Alstyne, and I published a short piece in the Washington Post and indicated the possibility that the Federal Government would indeed have the authority under the spending power, if this amendment passed, to mandate a federally-composed prayer.

There followed a considerable silence from the Department of Justice which I think recognized the correctness of our position. We did find a response published in the Post from the Deputy in the Department of Education, who just simply characterized that suggestion as ludicrous. We wrote back in response and went through the Department of Justice's own memorandum, citing the Department's own acknowledgment that Government control could follow from this amendment.

The first amendment has been part of our Constitution for 192 years and this amendment, were it, say, the 27th amendment, would be part of our Constitution perhaps for centuries to come, and it would thus permanently remove the first amendment barrier on Government officials exercising control.

Now, I will tell you what I think part of the problem is, and that is that there have been considerable over-reactions to the decisions of the U.S. Supreme Court, which I think are far more careful in protecting religious liberty than a couple of lower court decisions.

I do feel very strongly that where a college or a high school or even a junior high school permits students to engage in extracurricular activities of a wide variety, equal access for religious groups should be possible. I am confident that the U.S. Supreme Court will agree.

Now, the Supreme Court denied certiorari in the case that came out of Lubbock, TX, in spite of the fact that a group of 24 U.S. Senators had urged in an amicus brief that the Court review in that decision.

Now, Senator, I took a look at the *Lubbock* record and I can understand how I think no responsible law clerk or Justice would have considered that a "cert-worthy" case. The fifth circuit, whose opinion, I think, is regrettable in some respects of dictum, did recognize that, "Our review is made more difficult by the lack of data put forth before the trial court. The record is sadly lacking." (669 F.2d. 1038, 1044.n.13.)

It was a very confused case because the Lubbock school system had been engaging in a practice of daily religious exercises over the loud speakers throughout the schools, the distribution of Bibles in the schools to every student, and evangelical assemblies.

They adopted, after complaints in 1971, a policy against it; the policy was ignored. In 1979, they adopted another policy; the policy was ignored and the practices went on. In the midst of the litigation before the trial court, after discovery, a short "equal access" paragraph was adopted by the school board.

But the district court and the court of appeals both noted that there was simply no basis for understanding how that policy would work in practice. It simply was not a very good case, given the complications that these religious practices had been initiated by State officials and were then "voluntarily" continued. It was very hard to separate out those strands; it therefore would not have been a suitable case for the Supreme Court to review. There is no reason to believe that the Supreme Court agreed with the lower court decision.

A year before the Court's salutory decision in *Widmar*, there was a decision from the second circuit in *Brandon* v. *Gilderland Central School District,* 635 F. 2d. 971 (1980) in which, with all due respect, a three-judge panel of the Second Circuit reached a decision which, in my view, is erroneous. It was inconsistent with the fundamental principles the Supreme Court was to articulate shortly thereafter in *Widmar.*

The Supreme Court, very shortly after its *Widmar* decision, declined to review the second circuit opinion in *Brandon.* I wish they had taken it. The Court may well have felt that there needs to be time for the legal community to absorb the *Widmar* principle that there really is a first amendment right—a free speech as well as a free exercise right—on the part of those who wish to have religious discussions and exercises to utilize public facilities on an equal basis.

There are some statements in the second circuit opinion in *Brandon* that I think are just wrong. The court said that while students have a first amendment right to political speech in public schools, "sensitive establishment clause considerations limit their right to air religious doctrines."

Well, I simply do not think it is persuasive that there is less first amendment freedom for the expression of religious speech than there is for political speech, and I hope the Supreme Court would clearly reject any such principle and I am fairly confident that they will do so in a proper case.

It seems to me, though, that to predicate an amendment to the Constitution on one or two erroneous lower court decisions, or even to engage in a rather extraordinary exercise of the spending power to enact Federal legislation, is an excessive overreaction to a couple of lower Federal court decisions.

There are some particular problems with both the Hatfield and Denton bills. Both of the equal access bills have the problem that there could be States which would, in fact, have no choice but to lose their Federal funding. Let me explain that.

As you know, there are 15 or 16 States which have in their State constitutions very rigid antiestablishment provisions, Missouri is a principal case; it has what is called a Blaine amendment.

In such a State as Missouri, it could very well be that if this legislation goes beyond a very limited principle and gives any special access at all to religious groups, Missouri under its State constitution simply could not comply.

Now, one's immediate response is that the supremacy clause would give the Federal Government control. The supremacy clause would mean that Congress could override the Missouri State constitution. But these bills do not purport to override the Missouri State constitution.

They give a school district a choice of giving up the funds or complying with the Federal bill, so there is no Federal preemption. A school district is not directly required by the bills to adopt this access for religious groups. It only is told that its Federal funding is dependent upon it.

So, I think there would be some difficulties that ought to be thought about, and it might be a bit hasty to adopt either of these bills as a response to what seem to me to be one, and possibly two erroneous lower court decisions.

My only closing remark, Senator, is that I wish, if representatives of either the Department of Education or the Department of Justice come back before the committee on this issue, I would like to see the committee directly put to those officials—for example, to the Deputy Attorney General—this question: if this amendment is adopted and ratified by the States, will there be anything in the Constitution that would prohibit the Federal Government from conditioning the receipt of Federal funds in all school districts in the United States on the adoption by those school districts of Federal religious exercise guidelines issued by the U.S. Department of Education?

Senator **Hatch**. We will be happy to submit that question to them.

Professor **Dellinger**. Thank you.

Senator **Hatch**. Would you explain the Blaine amendment that you mentioned?

Professor **Dellinger**. The Blaine amendment is a provision in some State constitutions which takes a very strict position against any State aid to religion whatsoever. Some States have gone beyond even the first amendment.

For example, in *Widmar,* the University of Missouri-Kansas City said, "We cannot let this young Christian group meet on our state campus because our state constitution forbids it." In that case, the U.S. Supreme Court held that the first amendment overrides the State constitution, grants equal access, and forbids discrimination on the basis of the context (religious) of the speech involved.

If the bills introduced by Senator Denton and Senator Hatfield do no more than adopt the position already adopted by the Supreme Court in *Widmar,* then, of course, there is no problem because the first amendment would override the State constitutional restriction. But then in that case those bills are wholly unnecessary.

Senator **Hatch**. Well, did not Congress after the Civil War come close to amending the Constitution with its own national Blaine amendment? And I might just parenthetically say that this says something about the intent that 14th amendment to incorporate the first amendment?

Professor **Dellinger**. Those are issues that I think, Senator, are buried in the womb of time. I certainly agree that the first amendment of the Constitution was only intended to limit the Federal Government and not to limit the States at all.

After the adoption of the 14th amendment, it then became the responsibility of the courts to determine what is the content of liberty protected against State interference by the 14th amendment?

There are many sources for a court to provide some content for that "liberty." One source is to look and see what liberties were guaranteed against the Federal Government, and to ask whether the meaning of the 14th amendment is that those same liberties should be applied against the State governments.

Even those Justices who do not believe in some strict incorporation, however, like Justices Harlan and Frankfurter, believed that the principle of liberty guaranteed against State infringement by the 14th amendment is one which the courts are in a very real sense charged with developing.

You have to remember, Senator, that the Congress which proposed the 14th amendment was made up very largely of lawyers—lawyers who were fully familiar with both *Marbury* v. *Madison* and *McCullock* v. *Maryland*. So, those who drafted the 14th amendment and sent it to the States were familiar both with the concept of judicial review and with an open-textured reading of the Constitution. They knew John Marshall, so in that sense they knew what they were doing.

Senator HATCH. In light of the intent of the framers that Professor Cord has shared with us concerning the establishment clause of the first amendment, do you feel that there is a need for amending the Constitution to correct the Court's error?

Professor DELLINGER. I am not at all persuaded that the Court is in error. I am not persuaded that the analysis of history either by members of the Court or by Professor Cord is definitive on this issue.

Senator, one problem is this: the Supreme Court's decisions have only invalidated teacher-led, school-initiated, government-sponsored prayer. Now, this committee has heard accurate statements from around the country that there are school principals who say, "We cannot allow the Fellowship of Christian Athletes to have a meeting at our school, even though we permit the key club and the rodeo club to meet."

There are school principals around the country that think that. Do you know why they think that? They think that, in part, because the President of the United States and many distinguished Members of Congress have for many years been misleading the American people by constantly stating that the U.S. Supreme Court has forbidden all prayer in the public schools.

That just is not true, but unfortunately a lot of school principals believe what U.S. Senators and Presidents tell them the Supreme Court has decided. You have gone out—not you personally, of course, Senator but Members of Congress have gone out telling people over and over again, and the President has said as a candidate and later, that the Supreme Court of the United States has forbidden little children to pray in schools. And what happens? Some people take them at their word, including a lot of school principals who think that you cannot allow any prayer on public premises.

The Supreme Court has never held that. And when the court in *Widmar* had the first occasion to deal with any truly voluntary student activity, they expressly held that on State university property, built with State funds and paid for by State taxpayers, you could indeed have prayer. And you could have worship to the extent that the facilities were available to similarly situated, nonreligious organizations.

That has made it quite clear that the Supreme Court does not believe that there cannot be prayer in public buildings. They expressly approved of prayer in public buildings. Indeed, they told the University of Missouri at Kansas City that, "You must allow these religious activities to take place on State property."

That was concurred in, might I say, Justices Brennan, Marshall, Stewart, Blackmun, Powell, Rehnquist, Stevens, and O'Connor and by the Chief Justice—eight of the nine Justices agreeing on a single opinion.

Senator HATCH. That is astounding.

Professor DELLINGER. I think what we have here is a nonproblem, a problem which, if it exists, it exists because a lot of school principals have been misled by statements attributing to the Supreme Court something the Supreme Court has never held.

Senator HATCH. I think it is fair to say that things have been so confused that there has at least been a chilling effect on the free exercise of religion.

Professor DELLINGER. I think that may be a problem.

Senator HATCH. A number of us believe it may take a constitutional amendment to resolve that problem.

Professor DELLINGER. Well, the reason I think we do not need a constitutional amendment is that the Supreme Court has not addressed the question of whether high schools, junior high schools, or any school that allows student-initiated, voluntary activities must also allow student-initiated religious activities.

What evidence do we have on this question? We have an 8-to-1 opinion that firmly states the principle that you can use public property for religious activities—an 8-to-1 decision of the U.S. Supreme Court in the college setting.

The Court notes in a footnote, "We do not reach in this case the high school issue." I am willing to bet the mortgage (though I assume, Senator, from what I know that you are not a betting man) I am willing to bet the mortgage that in a case involving truly student-initiated, voluntary prayer activities in a public school setting, the Supreme Court will apply the principles of *Widmar* and forbid discrimination against extracurricular activities involving religious speech.

The idea that we need a constitutional amendment to beat the Supreme Court to the punch—an amendment to the Constitution to deal with, at the most, two erroneous decisions of lower three-judge court panels—does not strike me as very persuasive, given the risk that this particular amendment does so much more by creating a first amendment black hole with respect to prayer.

When you create a black hole in the Constitution—which is what you do when you use the language "nothing in this Constitution prohibits,"—no matter how sectarian the prayer, no matter how many politicians and bureaucrats were involved in devisive religious warfare in agreeing on the liturgy, when such a case comes to the Supreme Court they are going to say that; nothing in this Constitution prohibits it.

Senator HATCH. I have appreciated your testimony today and I want you to know that I agree with much of it.

Professor DELLINGER. Well, Senator, one of the reasons I enjoy testifying before this committee is that you take these issues very seriously.

Senator HATCH. I think you and your colleague, Bill Van Alstyne, have both contributed generously to this committee and to its thought processes on constitutional issues. I certainly appreciate

Professor Cord's contribution here today as well, and I have enjoyed reading his scholarly work.

I think you have been very helpful. I have had a lot of questions about the administration's constitutional amendment. I believe that we wi~~ll be~~ making some changes in its wording before it gets out of this committee.

Professor **Dellinger**. One possibility, Senator, is a sense of the Congress resolution adopted by both Houses of Congress—this may seem awfully mild, but I think it would respond to the problem—stating clearly that the Congress believes that the principle of equal access is a constitutional, guaranteed right of every student in a public school to have equal access, to deal with the *Lubbock* and *Brandon* cases.

Senator **Hatch**. That is an interesting comment. Some of us feel that we really do need to resolve the issue because it has had a chilling effect on people for many years, particularly since the Engel versus Vitale case.

In fact, I think it may have started with the Everson versus the Board of Education case. I think that case alone began this so-called assault on the first amendment privileges.

Professor **Dellinger**. I do recognize that there is a problem, There is a statement, I believe, by Senator Hatfield that recounts a Sonoma, CA, case where you have a wholly-voluntary young group of religious students who wish to use the school premises in the same way that every other voluntary group does.

The school board attorney reads the *Widmar* case of the Supreme Court and he reads the three-judge decision in the *Lubbock* case, and he finds *Lubbock* controlling. I think that is wrong.

People tend to overreact to lower court decisions. We have a whole lot of Federal judges these days, and in area after area I find people overreacting to lower court decisions which often do not stand the test of time when they come to the scrutiny of the U.S. Supreme Court.

Senator **Hatch**. I agree with you on that. You, Bill Van Alstyne and Don Horowitz, we have given some tremendous testimony here.

Professor **Dellinger**. Thank you.

Senator **Hatch**.I might want to submit some questions to you in writing. But before you go let me ask you the same question I asked the Deputy Attorney General.

Should the equal access concept be made optional at the choice of the local district, or should it be made mandatory?

Professor **Dellinger**. I think that one who believes in the values of federalism would see some benefit in making it optional, if legislated by Congress. Frankly, though, Senator Hatch, I am persuaded that the principle of equal access is a present first amendment principle, whether this Congress acts or not, and that it applies already to every school district, and that the Supreme Court will ultimately so hold.

There is a problem with the primary grades, obviously, because we do not generally allow primary grade students to initiate their own activities. I do not see any way that one could have a religious exercise in the primary grades that was not State-sponsored and school-run.

I would think that in the right circumstances, having a period of quiet meditation is constitutionally acceptable in those primary grades, and then allowing student-initiated, voluntary activities at the junior high school and high school level.

Senator HATCH.Then you would extend the *Widmar* concept that it is a first amendment right for college students to have equal access on school premises for student-initiated religious extracurricular activities? Would you extend that concept?

Professor DELLINGER. Yes, I would extend it all the way down into the public schools as far as any particular school still considers students old enough to initiate and run their own extracurricular activities, and makes the facilities available.

This notion that you can allow the private businessmen's league to use the school gym and you cannot allow the church league to use the school gym is simply a discrimination against religion that ought not be tolerated.

Senator HATCH. Or the Tri-Hi-Y group of young girls wanting to meet voluntarily.

Professor DELLINGER. I think that should be perfectly acceptable. Again, I see no indication that the Supreme Court would not so hold in a properly presented case brought before them.

Senator HATCH. Other than the Fifth Circuit, that is.

Professor DELLINGER. Both the *Lubbock* case from the fifth circuit and the *Brandon* case in the second circuit—both of those cases contain reasoning which is expressly rejected by the eight-to-one majority in the Supreme Court's subsequent *Widmar* decision.

Senator HATCH. Well, I just want to personally thank you for being with us today. You folks from Duke never let us down. I commend your university for the high quality of thinking that you have down there. I do not always agree with you, I have a great respect for the work you do.

You have added a lot to this committee's deliberations, on this very important issue. Thank you so much, Professor Dellinger; we appreciate it.

Professor DELLINGER. Thank you, Senator Hatch. Thank you, Mr. Markman.

[The prepared statement of Walter Dellinger follows:]

PREPARED STATEMENT OF WALTER E. DELLINGER

Before the Subcommittee on the Constitution of the Judiciary Committee of the United States Senate, May 2, 1983.

My name is Walter Dellinger and I am Professor of Law at Duke University. I appreciate having been invited by the Committee to testify today on the constitutional amendment proposed by President Reagan on May 17, 1982, and now being considered by this Committee.

This amendment (which will apply to every public institution and not merely to schools) would effectively repeal a portion of the First Amendment. Promoted by its sponsors as an amendment which would merely "permit children to pray in schools," its potential impact would be considerably different: it would empower government officials to compose officially approved devotional exercises and to require that these exercises be conducted regularly in public institutions.

The language of the amendment itself is deceptively simple. As proposed by the President, it reads in full:

> NOTHING IN THIS CONSTITUTION SHALL BE CONSTRUED TO PROHIBIT INDIVIDUAL OR GROUP PRAYER IN PUBLIC SCHOOLS OR OTHER PUBLIC INSTITUTIONS. NO PERSON SHALL BE REQUIRED BY THE UNITED STATES OR BY ANY STATE TO PARTICIPATE IN PRAYER.

The text of the amendment does not immediately alert us to the spectre of state and federal officials determining what official theology should be imposed on state or nation. This is because the amendment avoids stating on its face who is empowered to determine the content of the religious exercises to be performed in public institutions. Once that question is asked, however, the answer is clear: whatever officials would, in the absence of the First Amendment, otherwise have authority to control the institutions in question.

The official "analysis" issued by the White House on May 17, 1982 to accompany the proposed amendment states that "The determination of the appropriate type of prayer is a decision which should properly be made by state and local authorities." In the first instance, of course, it will be fully within the power of local school boards to enact the religious exercise of the dominant local religion as the exclusive devotional to be used in local classrooms. But if the prevailing local liturgy is not acceptable to those who dominate state politics, the state legislature or state department of education may pre-empt the local decision and mandate a different package of prayer and scripture to be used throughout the state, by every school district, in every classroom.

Nor does government control stop there. Under this amendment, effective control over religious exercises in schools and other public buildings may ultimately vest in Congress. By removing the First Amendment's barrier to government control over prayer in public facilities, the amendment will leave Congress free to prescribe the official religious ritual to be conducted in all federal institutions. Once the amendment is ratified, moreover, there would be no constitutional restriction preventing Congress from providing federal financial assistance only to states and school districts that provide for uniform religious exercises in keeping with the regulations of the appropriate federal agency.

There is nothing imaginary in this scenario. State and local communities choosing to receive federal education funds must now comply with a wide range of regulations issued by the United States Department of Education. There is now one thing -- and one thing only -- that prevents Congress and the federal bureaucracy from conditioning federal funds on compliance with federal "religious exercise" guidelines: the First Amendment. And it is that very portion of the First Amendment that the White House proposal would strip from the Constitution.

Because it would wholly remove the subject of "group prayer in public institutions" from the Constitution, the amendment would vest in every level of government the power to establish whatever particular religion can command a legislative majority. This could lead, over time, to a destructive competition among the more than 375 religions in the United States as each seeks to persuade bureaucrats and politicians to select the liturgy of its sect for regular use in public institutions.

That both government control and sectarian content are contemplated is clear: the amendment's White House sponsors flatly state their intention that it overrule Engel v. Vitale, the Supreme Court's 1962 School Prayer decision, which itself involved a prayer composed by a state-wide government agency for exclusive use in the public schools, where it was to be offered daily for chorused, oral, group recital by "willing" school children. The Supreme Court held the state's imposed secular liturgy in Engel to be squarely contrary to the First and Fourteenth Amendments of our Constitution. Writing for the court, Justice Black observed:

> [I]t is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government.

Religion has been for nearly two hundred years a private matter uniquely protected from government intermettling. This amendment would abandon that sound ground, and it should be rejected by this committee.

Senator HATCH. Our last witness today will be William P. Thompson, the stated clerk of the United Presbyterian Church of the United States. Mr. Thompson is an attorney and a member of several bar associations as well.

Mr. Thompson, we are certainly happy to have you with us. We will put your complete statement in the record. Unfortunately, I have to leave here in about 10 minutes and I would like to ask you a question or two, so if you could summarize, it would mean a lot to us. Your full statement will go into the record.

STATEMENT OF WILLIAM P. THOMPSON, STATED CLERK OF THE GENERAL ASSEMBLY, UNITED PRESBYTERIAN CHURCH IN THE UNITED STATES

Mr. THOMPSON. Thank you, Senator. I shall certainly try to do so. I want to begin by saying that as Stated Clerk of the general assembly, it is my task to communicate the actions of that general assembly to you and to the courts.

I digress from my statement at this point to say that I authorized the filing of an amicus curiae brief in the *Lubbock* case supporting the principle of equal access. But we are here to talk about something which seems to me to be quite different.

As recently as June 1982, the 194th General Assembly of the United Presbyterian Church took an action which is set out in full on the second page of my testimony. That assembly stated that,

> Convinced that religion does not need and should not have the sponsorship of government, and that attempts to provide such sponsorship will inevitably generate sectarian and inter-religious conflict, therefore the Assembly declares its opposition to the proposed constitutional amendment on school prayer and urges United Pres-

byterians not to be misled by references to officially-sponsored classroom prayer as voluntary or by allegations that their children do not now have the right to pray in public schools.

This is not a commitment arrived at recently or easily by American Presbyterians. Presbyterians are among those who trace their theological ancestry back to John Calvin in Geneva. The next section of this paper indicates some of the problems confronted by Calvinists in this country who were not Presbyterian, but who were Congregationalists, or committed to Congregational polity, in attempting to deal with these issues.

I pass on to the more recent history of the Presbyterian Church, which began in the latter half of the 17th century and carried over into the 18th. This was largely dominated by a group of sturdy Scotch-Irish Presbyterians, among whom perhaps the most important or the one best known was the Reverend Francis Makemie. The 300th anniversary of his coming to this continent is celebrated this year.

In 1707, long before the Bill of Rights, Francis Makemie, who was the Moderator of the First Presbytery established in the colonies, was arrested for preaching without a license in the colony of New York, in which the Church of England was established.

His eloquent defense before the colonial governor, Lord Cornbury, and his final acquittal by a jury were widely acclaimed as a victory for religious freedom in the colonies and are landmarks in the history of developments that led finally to the first amendment.

The first church body to recognize the Declaration of Independence was the Presbytery of Hanover in Virginia. This judicatory addressed a memorial on October 24, 1776 to the Virginia Assembly, in which the members of the Presbytery "rely upon this Declaration to secure us the free exercise of religion according to the dictates of our consciences."

Accordingly, the memorialists noted—and this was 1776—that "they ask no ecclestiastical establishment for ourselves, neither do we approve of them when granted to others."

It was out of such experience and struggle in colonial America and the years of the Revolutionary War that the Presbyterians established the first of their national judicatories, known as the General Assembly, in 1789. I note that that was 2 years before the Bill of Rights was incorporated into the Constitution.

As a part of the preliminary principles adopted by that first General Assembly, we have a statement that is now a part of the constitution of the United Presbyterian Church which I would like to read. "God alone is Lord of the conscience and hath left it free from the doctrines and commandments of men which are in any way contrary to his word or beside it in matters of faith and worship. "Therefore, we consider the rights of private judgment in all matters that respect religion as universal and unalienable. We do not even wish to see any religious constitution aided by the civil power further than may be necessary for protection and security, and at the same time be equal and common to all others." This obviously states a principle which was common to the church government of the Presbyterians and to the first amendment.

I would call to your attention the fact that it was prior to *Engel* v. *Vitale* that the Presbyterian Church began a study of the relations between church and state. That history is summarized in the testimony of my predecessor in the office of stated clerk, Dr. Eugene Carson Blake, which he offered in 1964 at the time that the reaction to the *Engel* case was being felt in the land.

When the 1962 decision of the Supreme Court was announced, the United Presbyterian Church was midway in an extended review of its policy regarding relations between church and state. The review was conducted by a special committee authorized and instructed by the General Assembly in May 1960.

In May 1962, before the *Engel* decision, the General Assembly considered a preliminary report on the issues, including the questions of prayer and Bible reading in public schools, and referred the report and recommendations to the congregations and presbyteries for study and response prior to the final General Assembly action in May 1963.

The entire report was studied by 989 congregations and 131 presbyteries, whose votes were tallied on each of 10 sections separately. The section on prayer and Bible reading was the most controverted part--hardly surprising in view of the public reaction to the *Engel* case. But it was approved by the votes of two-thirds of the jurisdictions.

The entire report was then adopted by the General Assembly in May 1963. The crucial quotation is set out on page 9 of the statement.

> Religious observances should never be held in a public school or introduced into the public school as part of its program. Bible reading and prayers as devotional acts tend toward indoctrination or meaningless ritual and should be omitted for both reasons.

I hasten to add that one of the reasons we oppose official prayer in public schools is because we believe that it does not have the effect of arresting the evident decline in public and private morality. That can be done only through the instruction of the church and the home.

Attempts to promote religion through Government sponsorship, such as the amendment currently proposed, inevitably generates social and religious conflict. History is replete with bloody confirmation of the disastrous effort to compel faith or the observance of faith by civil fiat.

Much of the world, even today, is sick with the fever generated when religion wields the power of government or contends for its favor and patronage.

Should Congress send such a proposal to the States, 50 legislatures will become religious combat zones, with the terrible examples of Northern Ireland and Lebanon not altogether inconceivable. Should such an amendment by some chance be ratified, the conflict will continue in every American community as well as in the courts. In that event, the fruit of your labor will not be civic morality, but increased and unceasing civil strife.

The attempt to describe the issue as "voluntary" prayer is misleading. Any person can now pray in public school as faith leads them to pray, so long as that prayer is not coercive to others or disruptive of the school's life and function.

The intent of the amendment is to provide officially sanctioned, public group prayer as part of the program of the school. To suggest that those who find State-sponsored religion meaningless, trivial, or offensive may ask to be excused is like saying that black persons who find State-sponsored discrimination offensive can move to another country.

We are guaranteed freedom from State-established religion, not the right to absent ourselves from its services. That guarantee should be kept intact and unambiguous.

I appreciate the opportunity to testify today. I am pleased that the entire statement will be in the record.

Senator HATCH. Thank you, Mr. Thompson; we appreciate your testimony.

Is your statement reflective of the official position of the Presbyterian Church?

Mr. THOMPSON. It is,

Senator HATCH. OK. How do you respond to the historical documentation presented by Professor Cord concerning the original intent of the Founders with regard to the first amendment?

Mr. THOMPSON. I do not necessarily disagree with his position. I submit that many of the people who were involved in drafting the constitution of the United Presbyterian Church and the first amendment and the other 10 amendments that we know as the Bill of Rights were identical in their intention.

They stated it for the church; it was included in the church's constitution 2 years or 3 years before it was included in the Constitution of the United States.

Senator HATCH. Well, if you do not disagree with Professor Cord, then you do disagree with the Supreme Court, because Professor Cord's conclusions are opposite——

Mr. THOMPSON. I disagree with some of the decisions of the Supreme Court, not with the decision in the *Engel* case.

Senator HATCH. OK. What are your views with regard to the propriety of silent prayer? Do you have any difficulty with that?

Now, you did express that anybody can silently pray at any time in the schools.

Mr. THOMPSON. That is now permitted.

Senator HATCH. But would you have any objection to voluntary silent prayer?

Mr. THOMPSON. I have no objection to voluntary silent prayer. I think that accomplishing it by a constitutional amendment is overkill. It can be done now.

Senator HATCH. What are your views or those of your church with regard to the *Lubbock* controversy?

Mr. THOMPSON. Well, as I said in my testimony, I authorized the filing of an amicus brief supporting the principle of equal access in the *Lubbock* case.

Senator HATCH. You indicated that you felt that oral prayer may become ritualistic in your statement. Does oral prayer always become mere ritual or trivial, in your view? Can this be avoided? Does silent prayer avoid this pitfall?

Mr. THOMPSON. I think it would tend to do so. I think there is a hazard that a period of silent meditation could become an occasion for activity quite unrelated to a religious motive, but I do not believe that it is subject to the same criticisms that the compulsion necessarily inherent in a set prayer is subject to.

Senator HATCH. Do you feel that local school boards can develop some policy that will permit school prayer without causing embarrassment to those who do not wish to participate?

Mr. THOMPSON. I do not believe that local school boards can draft a prayer which will not have the effect of establishing some religion over others.

Senator HATCH. It has been great to have you here. I think your statement has been very interesting. We appreciate the time and effort you have put forth to be with us.

Mr. THOMPSON. Thank you.

Senator HATCH. With that, we will recess these hearings until next Monday.

[Whereupon, at 11:17 a.m., the subcommittee was adjourned.]

[The prepared statement of William P. Thompson follows:]

PREPARED STATEMENT OF WILLIAM P. THOMPSON

My name is William P. Thompson. I appear before you today, as the Stated Clerk of the General Assembly of the United Presbyterian Church in the U.S.A., to communicate the opposition of the General Assembly of that Church to the proposal to amend the United States Constitution to authorize prayer in the public schools.

The United Presbyterian Church is the largest of the American denominations that continue in the theological tradition of John Calvin and govern themselves by representative bodies composed of both ministers and lay officers known as elders. It is presently composed of some 2 1/2 million members in nearly 9,000 congregations, organized into 151 presbyteries and 15 regional synods. The General Assembly is the denominational governing body, meeting annually with over 600 representatives elected by the presbyteries, half ministers and half elders. The General Assembly's judgments on public issues form the most authoritative body of church social policy, though authority is declarative and not coercive in our polity. As permanent executive officer of the General Assembly, it is my responsibility to communicate its policies to you.

The proper relationship between the power of government and the practice of religion is a matter of deeply rooted historic concern to Calvinists and Presbyterians. The most recent action of the General Assembly was taken in June of 1982 and was directed specifically to the matter before you today. I have appended the entire text of the resolution adopted then to this statement and quote now its operative clauses:

> "The 194th General Assembly (1982) of the United Presbyterian Church, convinced that religion does not need and should not have the sponsorship of government and that attempts to provide such sponsorship will inevitably generate sectarian and interreligious conflict, therefore:
>
> 1) Declares its opposition to the proposed constitutional amendment on school prayer;
>
> 2) Urges United Presbyterians not to be misled by references to officially sponsored classroom prayer as 'voluntary' or by allegations that their children do not now have the right to pray in public schools; and

3) Directs the Stated Clerk to communicate this resolution to the members of Congress."

This is not a commitment arrived at recently or easily by American Presbyterians. Calvinists and Presbyterians have been vitally intertwined with the religious and social history of America from its earliest days, spurred by the theology of the Reformer of Geneva who asserted that politics, the governance of the civil community, was the highest vocation to which Christians could aspire. Given the volatile political and social setting of 16th and 17th Century Europe and the task of forging new concepts of church-state relations to succeed the "holy roman empire" concept of "Christendom," it is not surprising that tensions emerged as Calvinism spread to Scotland, England, Holland, and America. These tensions were particularly strong in America after the Calvinist Puritan victory in the English Civil War of the late 1640's.

Some Calvinists were drawn toward attempts to "establish" the new Protestant faith. The New England Puritans, later known as Congregationalists, who were long on piety if not on tolerance, in fact succeeded in legislating official religion in their colonies and, later, states. However, the arrival of the radical Calvinist, Roger Williams, in 1631 dramatized the equally vigorous emphasis on liberty in Calvinist thought and practice in church-state relations. Williams was officially a Baptist, though Perry Miller writes of him that he "remained to the end a stalwart Calvinist, believing firmly in predestination, reprobation, irresistible grace, and above all, perseverance of the saints."

After four years of struggle with the "official" Calvinism espoused by John Winthrop and John Cotton, Williams was summarily banned to Rhode Island in 1635, and began his remarkable experiment in religious toleration, finally culminating in the grant of a royal charter in 1633. American Presbyterianism's convictions about religious liberty owe much more to Williams than to the more powerful ruling Calvinists of Massachusetts and Connecticut, whose "establishments" all withered away in the first half century of American independence. In brief, American Presbyterians are not strangers to the struggle with those who would put the sanction of the state behind particular religious observance.

Roger Williams' passionate commitment to religious toleration was grounded in a concern for the peace of society, the authenticity of religion and the integrity of government. He expressed this in three propositions. First, "National religions," as he called them, lead to religious strife and persecution. A pluralistic system where every religious group has a fair and open chance to hear and be heard will better guarantee civil peace. Second, authentic religious expression and practice must come from the heart and may neither be coerced or contained by the state (a very strong emphasis in Calvin). The state should honor this reality, acknowledging that the power of the "spirit" transcends the power of the "sword." Third, the state's proper concern is to regulate by force of law ("the sword") the gross forms of material and physical harm, faith-breaking, and misrepresentation and disrespect of rights that make cooperative social life impossible. These "natural law commitments" are held in common by all and are therefore the proper responsibility of the government agreed to by all. Both government and religion are corrupted when civil power mimics the forms of faith, since civil power cannot compel the substance of faith.

The second powerful force that has shaped 350 years of Presbyterian conviction in these matters flows from the faith and experience of sturdy Scotch-Irish Presbyterians who came a bit later to this country. These Presbyterian Calvinists of the Middle Colonies and Virginia brought their own vigorous advocacy for religious freedom long before there was an independent nation or a Bill of Rights. In 1707, the Rev. Francis Makemie, Moderator of the first Presbytery established in the colonies, was arrested for preaching without a license in the colony of New York, in which the church of England was established. His eloquent defense before the colonial governor, Lord Cornbury, and his final acquital by a jury were widely acclaimed as a victory for religious freedom in the colonies and are landmarks in the history of developments that led finally to the First Amendment.

The first church body to recognize the Declaration of Independence was the Presbytery of Hanover in Virginia. This judicatory addressed a memorial on October 24, 1776, to the Virginia Assembly in which the members "rely upon this Declaration....to secure us the free exercise of religion according to the dictates of our consciences." Accordingly, the memorialists noted that "they ask no ecclesiastical establishment for ourselves; neither can we approve of them when granted to others."

It is not, then, a novel thing for Presbyterians to appear before legislatures in defense of religious liberty for themselves and others, as I appear today before you.

Out of such experience and struggle in Colonial America and the years of the Revolutionary War, Presbyterians came together in 1789, two years before the Bill of Rights was incorporated into the United States Constitution, to form the first General Assembly. The following assertion was adopted as the first of the "preliminary principles," part of the essential foundation of faith and order for the new national denomination being formed:

> "'God alone is Lord of the conscience and hath left it free from the doctrines and commandments of men which are in any thing contrary to His Word, or beside it, in matters of faith and worship.' Therefore, we consider the rights of private judgment, in all matters that respect religion, as universal and unalienable: We do not even wish to see any religious constitution aided by the civil power, further than may be necessary for protection and security, and, at the same time be equal and common to all others."

That statement remains unchanged as part of the Constitution of the United Presbyterian Church today, almost the same age as the equally simple First Amendment to the United States Constitution. They enshrine two facets of the same hard-won essential truth: A society that cares for civil peace and genuine religion will take great care to protect the precious variety of faith from the power or patronage of the state. That truth, I believe, is even more important in 1982 than it was in 1789 or 1791. The percentage of Americans in formal religious membership is far higher now than it was then, and the creeds they profess are far more varied.

This precious principle has been under increasing pressure from some quarters in our society in the last twenty years; that is since the June 25, 1962 decision of the United States Supreme Court in Engel v. Vitale, the New York Regents prayer case clarified what should have been obvious: "in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by the Government." Though official school prayers had not, in fact, been widespread in the nation, immediate efforts to amend the Constitution and so nullify the court decision ensued. The first of those attempts was the focus of extended hearings by the Committee on the Judiciary of the United States House of Representatives in 1964. The United Presbyterian Church presented testimony at that time, as it has in regard to each subsequent proposal, and I urge members of this committee to review that record carefully as they consider this latest attempt to negate almost two hundred years of constitutional history.

The testimony of my predecessor in the Office of the Stated Clerk of the General Assembly, the Rev. Eugene Carson Blake, offerred in 1964 was based on an extensive study made by a special committee of our denomination. The circumstances of that study and the General Assembly action that followed it testify to the strong and enduring character of the United Presbyterian commitment.

When the 1962 decision of the Supreme Court was announced, the United Presbyterian Church was mid-way in an extended review of its policy regarding relations between church and state. The review was conducted by a Special Committee, authorized and instructed by the General Assembly in May, 1960. In May of 1962, (before the Engel v. Vitale decision) the General Assembly considered a preliminary report on the issues, including the questions of prayer and Bible reading in public schools, and referred the report and recommendations to the congregations and presbyteries for study and response prior to final decision in May of 1963. The entire report was studied by 989 congregations and 131 presbyteries, whose votes were tallied on each of ten sections separately. The section on prayer and Bible reading was the most controverted part--hardly surprising in view of the public reaction to the June 1962 decision--but it was approved by vote in over two-thirds of the jurisdictions. The entire report was adopted in May 1963 by the General Assembly (528-298 or 64%) and has stood as basic policy since that time. The relevant section, conveyed to Congress in the 1964 hearings and at other times since, reads:

> "Because of the conflicts stemming from the pluralistic nature of our society; because of the abuses that have plagued every historic attempt at a theocratic society; because God has given all persons freedom to choose or reject the redemption offered in Jesus Christ; and because organic entanglement of church and state inevitably deprives persons of the full exercise of that God-given freedom;
>
> The General Assembly redeclares its conviction that church and state must be organically separate...and adopts the following guidelines for study and action by all judicatories of our church:
>
> 1) The celebration of religious holidays, Bible reading and prayer in public schools.
>
> f. religious observances should never be held in a public school or introduced into the public school as part of its program......Bible reading and prayers as devotional acts tend toward indoctrination or meaningless ritual and should be omitted for both reasons."

I have stressed the context in which this policy was adopted by our denomination. Though this study was started in 1960, the actual "year of decision" coincided almost precisely with the initial severe, often uninformed and intensely emotional reaction to the decision in Engel v. Vitale. In that climate, the solid and very widespread and public two to one affirmation testifies impressively to the depth and solidity of United Presbyterian commitment: "the government of our country must be neutral on matters of faith, dogma and indoctrination....We Presbyterians wish to live, teach and evangelize within a political order in which no church will dominate the civil authorities or be dominated by them."

There are those who argue today that the introduction of official prayer in public schools is needed to arrest the evident decline in public and private morality. Surely, there is no lesson more passionately sounded in both Old and New Testaments of the Bible than the warning that the mere recitation of prayer has no authentic relationship to a pious life or faithful service to God or the community. I can do no better today than to respect what was said on this matter in 1964 by the Rev. William A. Morrison, then General Secretary of the Board of Christian Education of the United Presbyterian Church:

> "If evidence were available from the years in which Bible reading and the recitation of prayers have been observed in some of the schools of our Nation prior to the recent decisions of the Supreme Court, that moral self discipline and religious commitment had resulted from these exercises,

> we might infer that the decisions of the Supreme Court had deprived the Nation of an effective means for the moral and religious instruction not now being provided by home, church or synagogue......By definition, the civil government or any of its agencies simply cannot accomplish the task of inculcating moral and theological commitment to the God whom thousands of Americans believe is disclosed uniquely in the Holy Bible......The only God who can be taught within and under the sponsorship of the civil community inevitable turns out to be one of several attractive idols or pseudogods, against whom the whole testimony of Old and New Testament witness must be directed.
>
> As an educator, I am also opposed to prayer and Bible reading in the public schools. Their practice, if constitutionally permissible, would seriously displace a major emphasis of public education away from a task it can perform to one it cannot perform, as I have suggested above. I believe it is possible to develop within the public schools a functional ethic based upon respect for human personality, compassion for one's fellow human beings, a sense of justice, and personal integrity. Creative and sensitive teachers, without injecting their own theological dogma into the learning situation, have demonstrated this to be true in the experience of many of us...I have confidence that such a humane functional ethic as I suggested above in the public schools would be a positive contribution to the growing maturity of our pluralistic society." [Emphasis added.]

Attempts to promote religion through government sponsorship, such as the amendment currently proposed, inevitably generate social and religious conflict. History is replete with bloody confirmation of the disastrous effort to compel faith or the observance of faith by civil fiat. Much of the world even today is sick with the fever generated when religion wields the power of government or contends for its favor and patronage. Should Congress send such a proposed amendment to the states, fifty legislatures will become religious combat zones, with the terrible examples of Northern Ireland and Lebanon not altogether inconceivable. Should such an amendment by some chance be ratified, the conflict will continue in every American community as well as in the courts. The fruit of your labor will not be civic morality but unceasing civil strife.

The attempt to describe the issue as "voluntary" prayer is misleading. Any person can now pray in public school as faith leads them to pray, so long as that prayer is not coercive to others or disruptive of the school's life and function. The intent of the amendment is to provide officially sanctioned public group prayer as part of the program of the school. To suggest that those who find state-sponsored religion meaningless, trivial or offensive may ask to be excused is like saying that black persons who find state-sponsored discrimination offensive can move to another country. We are guaranteed freedom from state-established religion, not the right to absent ourselves from its services. That guarantee should be kept intact and unambiguous.

In summary, on behalf of the General Assembly of the United Presbyterian Church, I urge you to oppose the so-called prayer amendment. It would seriously erode a fundamental and precious freedom, introduce sectarian controversy into every American community, divert public schools from their proper responsibility, and reduce religious faith and practice to a travesty. Religion does not need and should not have the sponsorship of government. Prayer is too important to believers to be routinized, reduced to mumbled incoherence as a political talisman, and trivialized to bland pan-religious conformity.

I thank you for this opportunity to communicate the opposition of the General Assembly of the United Presbyterian Church to the proposed constitutional amendment on prayer in public schools and public institutions.

194th General Assembly (1982) ACCS Resolution

II. RESOLUTION ON THE PROPOSED PRAYER AMENDMENT

REFERENCE X-176
[See page 108.]

Whereas the President of the United States has submitted to Congress a proposal to amend the Constitution of the United States with the following language: "Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any state to participate in prayer"; and

Whereas the President stated that the amendment was necessary in order to "restore the right to pray" and "to allow our children to pray in school," though this right is secured to individuals under existing law and constitutional interpretation; and

Whereas the intended effect of the proposed amendment is to permit a return to the situation that prevailed in many states twenty years ago, when officially sanctioned prayers were required or sponsored by public schools in classrooms; and

Whereas columnist James J. Kilpatrick recently wrote: "It is pure sham to contend that in such circumstances 'prayer and meditation' can be made 'voluntary.' Only the boldest children, willing to make themselves conspicuous, will walk out . . .The best solution is to leave a child's religious instruction where it belongs, in the home, in the church, in the temple, in his mind and heart. And when a child learns what prayer is all about, get him to read Matthew 6:5-8. The passage contains some marvelously sound advice"; and

Whereas the 175th General Assembly (1963) of the United Presbyterian Church stated that:

> Because of the conflicts stemming from the pluralistic nature of our society; because of the abuses that have plagued every historic attempt at a theocratic society; because God has given all [persons] freedom to choose or reject the redemption offered in Jesus Christ; and because organic entanglement of church and state inevitably deprives [persons] of the full exercise of that God-given freedom . . . religious observances [should] never be held in a public school or introduced into the public school as part of its program . . . Bible reading and prayers as devotional acts tend toward indoctrination or meaningless ritual and should be omitted for both reasons (*Minutes*, 1963, Part I, pp. 185-186) and;

Whereas the National Council of Churches, the Baptist Joint Committee on Public Affairs, the Synagogue Council of America, and the Union of American Hebrew Congregation, as well as other religious and societal groups, have expressed their opposition to this attempt to legitimate government-sponsored religious observance:

Therefore, the 194th General Assembly (1982) of the United Presbyterian Church, convinced that religion does not need and should not have the sponsorship of government and that attempts to provide such sponsorship will inevitably generate sectarian and interreligious conflict:

1. Declares its opposition to the proposed constitutional amendment on school prayer, believing that officially sponsored religious exercises tend toward indoctrination or meaningless ritual, which compromise authentic faith and also threaten the erosion of constitutional protections.

2. Urges United Presbyterians not to be misled by references to officially sponsored classroom prayer as "voluntary" or by allegations that their children do not now have the right to pray in public schools.

3. Directs the Stated Clerk to communicate this resolution to the members of Congress.

VOLUNTARY SCHOOL PRAYER CONSTITUTIONAL AMENDMENT

MONDAY, MAY 2, 1983

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON THE CONSTITUTION,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:53 a.m., in room 226-SD, Dirksen Senate Office Building, Hon. Orrin G. Hatch (chairman of the Subcommittee) presiding.

Present: Senators Thurmond and Grassley.

Senator HATCH. Mr. Secretary, I apologize for being late this morning. The Republican Senators have had a conference on the budget, and that is, of course, one of the most important things we are currently doing in the U.S. Senate.

But we appreciate having you here today.

Secretary BELL. I might say, that an academe tradition say that you are to wait at least 30 minutes for a full professor, and we think that the chairman is at least a distinguished professor, so you are really not overtime.

Senator HATCH. You may be the only one who thinks that way.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH, CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Ladies and gentlemen, this represents the second of 2 days of hearings by the Subcommittee on the Constitution on the proposed constitutional amendments relating to school prayer.

As with our first day of hearings, we are fortunate to have with us today an outstanding group of witnesses with a diverse variety of perspectives on this important issue. I would emphasize again, as I did during our first day of hearing, that the issue here is not simply public school prayer; an equally important issue is how constitutional policy is to be formulated in a free and democratic society.

Whatever one thinks about the merits of public school prayer, the Supreme Court's decisions in such cases as *Engel* and *Abington* can only be seen as having altered the previous prevailing understanding of the establishment clause of the first amendment meant. There decisions have raised serious questions in the minds of many constitutional scholars.

Is it possible to conclude that the so-called "wall of separation" erected by these and other recent cases was intended by the founders as they drafted the first amendment? Is it possible to reconcile these decisions were consistent with tbe policies and practices that grew from this amendment during the first 175 years of our Nation's history?

Is it possible to argue that these decisions were at all consistent with the will of the people? Whatever one thinks about the merits of public school prayer, can they reasonably deny that it was the Supreme Court itself that amended the Constitution with their decisions in *Engel* and *Abington*?

They amended the historic meaning of the first amendment, not through the normal constitutional route of article 5, not through the deliberate process of fashioning a new consensus for a revised first amendment, but through the expedient of judicial review.

Because the majority of the court disliked what Madison and Jefferson and Randolph had put together, they took it upon themselves to serve in the capacity of a continuing constitutional convention.

In the process, they utterly transformed the constitutional provision that had been previously compatible with a wide variety of contacts between church and state into one in which some unabridgeable "wall of separation" exists between the expression of religious values and the state.

As Professor Cord pointed out in his testimony on Friday, the first amendment of Madison and Jefferson, as opposed to that of Warren and Brennan, was compatible with tax-supported church schools, chaplaincies, trusts to spread religion to the Indians, construction assistance for churches, and of course, prayer within public institutions.

It is not necessary to endorse any of these policies—and I would not support several—to ask whether such an important part of the Constitution ought to be altered by five men on the Court rather than by the kind of deliberate consensus required in the amendment article of the Constitution.

If we are going to have a permanent Constitution, one that is not written on water, I believe that we must rely on the citizenry to alter the supreme law of the land, not judges.

As a member myself of a minority religion, I have only the greatest respect for the enduring principles of the first amendment.

Properly understood, the first amendment stands for tolerance in religious affairs, protection of those who profess faith in minority religions or in no religion at all, the avoidance of preferential treatment toward any religious denomination and the maintenance of the distinct spheres of church and state.

None of these principles, however, demands the neutrality toward religious values as a whole, nor indeed the apparent hostility toward religious that seems to be emerging from such decisions as *Lubbock* and *Brandon*. While our Constitution established a secular republic, it was never intended to establish one that was neutral on whether or not religion was to flourish. I look forward today to the testimony of our witnesses and thank each of you for being here with us.

We will turn to Senator Thurmond at this time for his statement.

OPENING STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA, CHAIRMAN, COMMITTEE ON THE JUDICIARY

The CHAIRMAN. Today's hearing marks the second of 2 days of hearings by the Subcommittee on the Constitution on the subject of proposed amendments to the Constitution relating to school prayer. This builds upon 3 days of hearings on the same subject held last year following the introduction of the administration's proposed amendment, as well as an additional day of hearing on Senator Denton's equal access legislation.

Let me emphasize once more that there are two distinct issues involved in these hearings. First, there is the Lubbock issue. In a circuit court decision last year, a Lubbock, TX, school board policy was found unconstitutional which permitted students to use public school facilities for student-initiated religious activities on the same basis as student-initiated nonreligious activities.

Thus while athletic clubs and political clubs and social clubs can conduct extracurricular activities on public school grounds, Bible study clubs are constitutionally forbidden to do so, according to the *Lubbock* decision.

Second, there is the issue of school prayer. In a series of Supreme Court decisions, particularly those in *Engel* v. *Vitale* and *Abington* v. *Schemp,* the practice of voluntary classroom prayer at the outset of the school day has been found in violation of the first amendment to the Constitution.

Mr. Chairman, I would observe, as I did last week, that the fundamental issue involved in the Judiciary Committee's focus is whether the Federal courts have departed from the original intent of the drafters of first amendment, as well as from the understanding given it for the first 175 years of our Nation's history.

The clear intent of the Founding Fathers was to ensure that the Federal Government not establish a national church or provide preferential treatment to any single religious order or denomination. The purpose was to prevent any national eccesiastical establishment.

There is absolutely nothing in the history or development of the first amendment until the past generation to suggest that it was designed to erect any wall of separation between the state and all expressions of religious values. Indeed, there was a profound awareness of the religious roots of the Constitution on the part of the Founders and a desire to ensure that the religious impulse remained a part of the Nation's constitutional and public fabric.

Mr. Chairman, when the Supreme Court in the mid-1960's ruled that voluntary prayer in the public schools was in violation of the Constitution, they engaged in amending the Constitution from the bench. In one fell swoop they overturned long-established public policies of tens of thousands of communities across the country.

A moment of prayer at the start of the school day, a policy that had enriched the founding of the Republic, was suddenly viewed as a menance to the first amendment. The average child who is placed in the classroom for 8 hours a day is allowed and encouraged to develop intellectually, physically, and emotionally.

But even a moment of structured prayer is treated as unconstitutional. The child is educated in political theory and sex education, and hygiene. He is taught baseball and football. He is instructed in music and art and literature. He is taught everything that goes into the building of individual character, but is absolutely forbidden from even a brief moment of prayer at the outset of the school day.

Because I disagree with the court's prayer decisions and because I believe that a well-rounded education requires some measure of personal introspection, I support a proposed constitutional amendment to overturn *Engel* and *Abington*. And I look forward to the testimony of all of the witnesses to assist us in developing the most responsive proposal that we can develop.

Senator **HATCH**. Our first witness this morning will be a good friend, the Secretary of Education, the Honorable Terrel Bell. Secretary Bell testified on the equal access issue before this committee last Thursday, and will testify today on the subject of voluntary school prayer.

Mr. Secretary, we are so happy to have you with us here today.

STATEMENT OF HON. T.H. BELL, SECRETARY OF EDUCATION, U.S. DEPARTMENT OF EDUCATION, ACCOMPANIED BY GARY BAUER, DEPUTY UNDERSECRETARY FOR PLANNING, BUDGET, AND EVALUATION

Secretary **BELL**. Thank you, Mr. Chairman.

With your permission, I will submit my statement for the record, give a brief summary of it, and then be available for questions.

Senator **HATCH**. Without objection, all statements as written shall be submitted to the record in full.

Go ahead, Mr. Secretary.

Secretary **BELL**. As I am sure this committee is aware, the President has a very deep and abiding interest in this amendment. What may not be as well known is that Americans across the Nation as well have an interest in it. A poll recently conducted by the New York Times found that between 69 and 85 percent of the population approves of voluntary school prayer.

And a Washington Post poll conducted as late as May of 1982 found that 75 percent of the American people support a constitutional amendment to allow prayer in the public schools.

And as the chairman indicated, for a large portion of our history in our schools there was no this prohibition against prayer. In fact, for the first 170 years our Nation's experience under the first amendment permitted States and localities to make the decision on this somewhat delicate subject.

And along about that time in 1962–63, the Federal Government through its judicial branch got into the act, and we have had a great amount of confusion and difficulty over it. I might just say, Mr. Chairman, as you well know, this is commencement time, and especially at commencement time is there a considerable amount of confusion in schools about whether or not they are in violation of the law if they permit prayer to be conducted in school buildings during commencement exercises.

In our examination of this issue, we conclude that the Founding Fathers never intended the Constitution to supress religious speech in public places. And surely the Founding Fathers did not intend for us to supress this freedom for religious speech in our schools of all places. The history of public education in this country up until 1963 was in actuality one of offering considerable amount of religious freedom.

In almost every city in this country, you will find a school named after Horace Mann. He is one of the Founding Fathers of American education. He emphasized character building and the view that a belief in God and some concern for, and instruction about, religion helps in attaining that objective.

We have found that in all of our studies of current practices in the schools, there is a great amount of concern and worry and lack of certainty about what school officials can do and what they cannot do. There is a difference between being neutral about sectarian religious views and being antireligion.

And we need in our schools a respect for both religion and we need a respect for the diverse views about religion that exist around the Nation. And we ought to be teaching that in our schools. And there is so much tension about it now that this is even a problem. And I would just like in conclusion to quote verbatim just a few lines from my testimony that has to do with whether or not we are coercind individuals into religion when we permit prayer.

The implied coercion theory presumes that group prayer by consenting students has a coercive effect upon the objecting students in violation of their right to free exercise of religion. And as one who has been deeply engaged with public education almost all of my adult life, I would register my disagreement over this charge.

We know of other places where other diverse views are expressed quite openly and freely. For example, during the debate over the Vietnamese war many teachers even wore black armbands. They felt that was their right to expression, and that it was not a manipulation of the students because they expressed their views.

We know from letters and from public opinion polls that parents would welcome the influence upon their children of other students that seek to develop their character through involvement in religious activities in the public school setting.

And this amendment would allow students to participate in prayer if they so desired, and in local situations where children are too young to make independent decisions, the wishes of parents or guardians could of course be honored in that regard.

The present school prayer amendment proposal primarily revolves around the question of religious liberty. We would emphasize that the Congress, the Senate and the House, open their meetings with prayer. We would emphasize, that as we all know, that it is engraved upon our money; it is found in our Pledge of Allegiance, and it is just universally found in almost all walks of life.

And I for one cannot understand why there has been such a strong prohibition against schools as public institutions that does not apply to other public institutions and entities in this regard.

So we would express our strong views that this amendment ought to be enacted by the Congress and given the opportunity to proceed on its way to amend our Constitution so that we will have freedom of speech and free exercise of the rights of students in America's schools. We think of all places we ought to offer it there.

We think that our school people will have the good judgment and the respect for the diverse views that exist about religion and that they will be able to make sure that we do not trample upon anyone's rights and that we will restore a right that we have enjoyed for many decades of our history.

We would express our support, Mr. Chairman, of this amendment. We hope that this distinguished committee will rule promptly and favorably on a matter that some people say to me kiddingly is not very important. But in my mind it is an extremely important issue and one that we hope prompt action would be taken on.

Senator HATCH. Well, thank you, Mr. Secretary.

Do you see any relationship between the absence of prayer in the public schools over the past two decades and the analysis of the deterioration of public education in this country reported last week by your Commission on Education, which came out with the excellent report, "A Nation At Risk"?

Secretary BELL. I would say, Mr. Chairman, that I do not know that we could identify this as an issue, and I would not go on the record as saying because we have not permitted school prayer, achievement has been declining. But I think it is a symptom of many of the trends and changes that are going on in this country that is undermining students and undermining character development and undermining a very serious commitment to education.

So I think the overall trend of which this is part has certainly been contributing to this.

Senator HATCH. Could you share with this committee your perspective on the proper role of the public schools in inculcating a sense of values in the schoolchildren in this country, and is the President's amendment consistent with that role?

Secretary BELL. Yes. I have believed that there are many common values that we ought to teach in the schools. There are other values that surely one would hold and another would not.

But those ideals that are described in our Constitution and our Bill of Rights and the ideals and traditions on which our country was founded are all, I believe, a part of what we ought to be getting back to in education.

And with that, I would surely emphasize that this amendment would help us in that regard.

Senator HATCH. Could you briefly summarize your testimony from last Thursday wherein you indicated your support of legislation which would guarantee that student groups of a religious nature have equal access to school facilities?

Secretary BELL. Yes. That testimony, Mr. Chairman, was related to the freedom that we ought to grant individuals and groups to have extracurricular activities of a religious nature. We permit all kinds of school clubs and school activities that relate to student's special interests to take place after school and to take place inside of the schoolyard and inside of the school building.

And in that regard, we think that at the present time students are discriminated against if they want to get together and study the Bible or the Koran or some other religious writing because they have a common interest in it. And so we think that they are being singled out in this regard. I might also indicate, Mr. Chairman, that one of the wire services, the lead article that came out on this said that the Secretary of Education had said that students should meet after school and study the Bible. And I would like to emphasize that the Secretary of Education, in responding to that question, is not saying that students should do that.

I think they ought to be permitted if they want to exercise their discretion in extracurricular activities to do that if they want to. And that was the point that we were emphasizing.

Senator HATCH. How do you respond, Mr. Secretary, to the argument that peer pressure will inevitably transform even the most voluntary prayer provision into compulsory school prayer?

Secretary BELL. Yes. My response would be that peer pressure is not working that way in other areas. We have various political groups in schools, and peer pressure is not converting all Democrats in school groups to being Republicans, notwithstanding my own biased wishes in that regard. [Laughter.]

Peer pressure did not convert everyone during the Vietnam era to go in one direction or another. We still have diverse views. Incidentally, I did not introduce my colleague, Dr. Gary Bauer, who studied this at length. He is a Deputy Undersecretary. He may have a comment to make on this since he has worked with students and observed them.

Mr. BAUER. I think the Secretary has made the point very well. First of all, the very concept, I think, tends to picture peer pressure toward religion as being something we should avoid, which I am not at all sure is the case, given the condition in many of our schools today.

But the Secretary, as he has indicated, already pointed out that in many other areas we seem willing to accept peer pressure and often in very questionable areas. And I think that the amendment which clearly indicates that no one will be required to pray answers very well the fear that there might be some sort of negative peer pressure come into play in this issue.

Senator HATCH. Senator Thurmond.

The CHAIRMAN. Thank you very much. Mr. Chairman, first I want to welcome Dr. Bell here. I think he is one of the ablest men in the Government. He has done a very fine job, and we are very proud to have him before this committee.

Secretary BELL. Thank you, Senator.

The CHAIRMAN. I also welcome his deputy, too; we are glad to have you.

Mr. BAUER. Thank you.

The CHAIRMAN. Now, Dr. Bell, for all these years, all these generations, when you grew up and I grew up and your father grew up and your grandfather grew up, in all these years we have had prayer in schools, and suddenly this question arises, and suddenly these decisions have been handed down by the Supreme Court.

As I stated, I heartily disagree with them, and from your statement, I presume you do too.

Secretary BELL. I certainly do.

The CHAIRMAN. Now, in the amendment that the administration is recommending, which reads this way: "Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions."

Well, why cannot the children use a classroom or a facility if they wish to pray as well as they wish to have an athletic event or wish to have a literary contest of some kind, purely voluntary, nothing compulsory, nobody required to attend?

But, after all, are not the moral values of our country still important to the fabric of our Nation?

Secretary **Bell**. I surely agree with that, Senator. And I think that there is so much confusion now; there is so much concern about getting into difficulty or promoting somebody's religious view versus someone else's, that we have totally stamped this out of our schools.

I do not think it was ever intended--I hope it was not even the intention of the Supreme Court, although I am not sure of that. As I told the chairman just before you came in, this is commencement time. And at this time of the year especially do we have a lot of questions about whether or not you can even have a benediction and an invocation at commencement exercises.

Now, many schools go ahead; others have arguments and debates and tension about it. So I think this amendment would clarify the matter, and I think it would restore a right that students ought to have just as much as other public entities ought to have.

As a school man, I think that we are singling schools out and education out for more scrutiny here than any of the other public entities. I do not see anyone complaining when you open your session of the Senate that you are inflicting religion upon anyone or that you are going to be coerced by religion because you open with prayer by some religious view that it happened to be the person that prayed. And so I do not see why that has been applied to schools as rigidly as it has.

The **Chairman**. Now, Dr. Bell, I thoroughly agree with your position. How do you respond to the opponents of school prayer who argue that religion ought to be confined to the church and the home?

Secretary **Bell**. Well, we are doing more than that; we are discriminating against those that are interested in religion. And so we are taking, I think, what I would call an antireligion position.

I would like to ask Gary Bauer, who studied this at length and is an attorney, to respond to that just a little more fully, if you would, please, Gary.

Mr. **Bauer**. Well, certainly, Senator, the church and the home are important places for religious teaching and religious expression, but I fail to see where believing that means that religion must be excluded from other areas of public life, particularly an area of such importance as the public schools in which the character of our children is being formed.

It struck me how far we have gone down, I think, a very slippery slope in this matter when I heard several weeks ago of an incident in the Fairfax County schools here in the Washington area in which a third grade student was reprimanded by her teacher because she chose to draw on the blackboard during a free time during the day in which the children are allowed to draw a rendition of the traditional Christmas scene.

The teacher told her to erase the drawing because it might offend other students in the room with different religious beliefs; when it seems to me—and I hope you all would agree—that a more proper approach would have been for the teacher to encourage those in the room with other religious beliefs to draw whatever was a part of their culture.

I think the Supreme Court rulings, which are bad enough on their own, have led to an atmosphere in the schools which attempts to block out any kind of religious expression. And I think that's a very dangerous development in a country such as ours that was built on religious belief.

The CHAIRMAN. Is not such an atmosphere calculated to cause students to believe, well, maybe prayer is evil; maybe I should not pray at all.

Secretary BELL. I believe that it does, Senator. I think that, as I said before, that we have such an "anti" position now that it is having a deleterious effect, regardless of what the intent was originally. Now, Senator, your view of God and whatever you conceive God to be may be different from mine. But if we are at a meeting or at lunch and you pray, you have a concept and a perception of God. Your perception might be different from mine. That had not ought to cause us to denounce the other's preception. We ought not have to listen to each other's prayers.

This leads to religious intolerance, and I think that all that we are trying to do in our Civil Rights Acts and all of the other provisions that we have in this country an to encourage diversity of views and to express them and through that expression to learn to respect other's views and out of that to grow closer to each other.

And those are my very sincere views about this problem, and that is at the crux of it, as I see it.

The CHAIRMAN. Dr. Bell, in the *Abington* case Justice Potter Stewart, who is now retired from the court, suggested that a system of compulsory education so structures a student's life that if religious activities are barred from the school, then religion is placed at an artificial disadvantage.

Would you agree with that observation?

Secretary BELL. Well, the problem is that the promulgators or the opponents to the school prayer amendment are constantly emphasizing that we do have compulsory education; we do have compulsory attendance laws. And, therefore, students have to be there. They do not have a choice. And, therefore, we are coercing them.

But I suppose—and I hope it is not an unfair comparison—that you have to be in the Senate. It is your duty. You have to be here just like it is a student's duty to be in school. And you have prayer in the House of Representatives. We have inscribed above the Speaker's chair, "In God We Trust."

And so I cannot understand those that——

The CHAIRMAN. Is it not an anomalous situation that we in the U.S. Senate—and I am going to open this Senate at 12 o'clock today—and the first thing I have to do after I rap for order and bring the Senate to order is to ask the chaplain to deliver a prayer.

Now, is that not an anomalous situation that here in the Senate that we can have prayer by a chaplain, and yet in the schools they cannot have prayer, even a voluntary prayer by a student.

Secretary BELL. I would say, Senator, that we would be even more ecumenical than you are. An astute student and school principal would have diverse groups with diverse views. I have noticed at commencement exercises where those that dare still have prayer; they make sure that they have the balance there.

Now, out in my home country—I happen to be a Mormon and I live in Utah where the dominant religion is the Mormon religion. There is great care that a rabbi or a priest or a Presbyterian minister or some other religious affiliation is asked to be there to offer one of the two prayers so that we have some other views expressed.

And I would say that is even more diverse than you have in the Senate where you have a Senate Chaplain who constantly offers all of your prayers.

The CHAIRMAN. Dr. Bell, what was the experience of this Nation prior to Engel and Abington with regard to the efficacy of school prayer? Did we find the horror stories that opponents of prayer assure us will take place if we pass this amendment?

Secretary BELL. We surely did not; my experience goes back quite a few years, you can tell, Senator, from looking at this white hair. And I have been in the school business for a long time. And I felt that the Senate proceeded to fix something that did not need fixing at that time.

Now, I would say, Senator Thurmond, that there have been cases where a prescribed prayer was written out and a student was asked to read that prayer off the card. And that may be offensive to many. And in my opinion that goes too far. As I understand it, at one time New York State had a prescribed prayer.

And so I suppose that that may have been the other extreme. But surely we have not had the problems and the horrendous situations of imposing religion upon students in our schools.

The CHAIRMAN. Admittedly, moral training is the principal responsibility of the home and church. I think no one disputes that. What happens, however, when parents fail to do this? Is it wrong to have the school serve as a safety valve in this regard? And do you see any correlation between the increasing prevalence of juvenile crime and drug abuse and other juvenile problems with a declining level of moral training of young people?

Secretary BELL. Well, I just do not think that we can avoid offering moral instruction in our schools. I submit that it is done every day. It is done when we teach our history, when we teach the Bill of Rights, when we teach about the civil rights laws and the equality of opportunity, and the great ideals of this country.

And surely as you teach about some of the great people and some of the great scoundrels in our history, you are either directly or indirectly teaching morality and character and you are inculcating values. And so those that say we ought to be value neutral in the schools, I do not think that they have really thought that through.

There is no way to be neutral on many values, and you cannot teach without teaching some values or some kind or another.

The CHAIRMAN. Is it not true that at every inauguration from George Washington down through Ronald Reagan that we had prayers at the beginning of the exercises?

Secretary BELL. Yes. It is my understanding that that has been traditional and has been practiced by every inauguration.

The **Chairman**. In other words, really, did not our forefathers come to this country seeking religious freedom?

Secretary **Bell**. They surely did. And it is replete in our history. It is just throughout our history and throughout all of our traditions.

The **Chairman**. Well, to deny the children the right to pray in schools, is that not denying them religious freedom?

Secretary **Bell**. In my opinion, the current position is an antreligion position. And if we are going to be neutral about religion, we surely have got to change the status quo because it is not neutral; it is antireligion. And if we are going to be teaching tolerance and diverse views and permitting others to have the same rights that you have in the Senate, as you have just indicated, we surely need to amend the Constitution because of what the Supreme Court has done to it.

The **Chairman**. Dr. Bell, what is your view on the Lubbock decision and its rejection of the so-called equal access concept in which extracurricular, nonreligious activities are acceptable and extracurricular religious activities are not?

Secretary **Bell**. I think that groups that want to get together and discuss ideas and study religious writings ought to be permitted to do that just as other groups are permitted to do that on an extracurricular activity basis. I would not favor sectarian instruction in the curriculum, as such, but I would surely favor extracurricular activities to go on.

I think we are singling them out and discriminating against their interests while we permit other interest groups to have all sorts of activities.

The **Chairman**. Dr. Bell, could a purely nonsectarian, nondenominational prayer be written, or does any prayer of any significance necessarily discriminate in favor of some religious doctrine?

Secretary **Bell**. I think that there could be some prayers that might come close. But I think that that is not what we ought to do. I think we ought to have diversity and we ought to have tolerance for different religious views and I suspect you could not write a totally nonsectarian prayer.

I do not know if Dr. Bauer has some views on that from his own legal training.

The **Chairman**. Dr. Bauer, do you have anything to say on this?

Mr. **Bauer**. Yes, Senator. I would just observe that I think one of the beauties of the President's constitutional amendment is that it would permit a school to provide an opportunity for student groups that have various religious beliefs to meet where they want to in the school to have a prayer that is consistent with their philosophy. There would be no reason why a school would have to try to write a nonsectarian prayer that would not offend anyone. For example, Mormon students could meet in one room at the beginning of the school day.

Baptist students could meet in another, and Catholic students in a third. I think that would be more consistent with the free exercise clause of the Constitution, which our courts seem to have forgotten about.

The **Chairman**. Now, there is a great deal of confusion as far as what is consistent with the establishment clause; do you find that this confusion has had a chilling effect upon any expression of religious sentiment in the context of public institutions?

Secretary BELL. I do, Senator. I do not know if Dr. Bauer wants to comment further, but——

Mr. BAUER. Well, I think it clearly has had a chilling effect. The story that I mentioned about the Fairfax County school is a good example. There has been an atmosphere created in the public school system in which religious expression of various types does not have the same type of protection as any number of political philosophies and other types of belief which the courts have encouraged in our schools and I think all that we are trying to get to through this constitutional amendment is a little equal time for what basically has been a very traditional set of religious beliefs that the country encouraged at its very founding.

The CHAIRMAN. Now, quite apart from the promotion of religion, do you see any merits in the suggestion that restoration of school prayer is a means of restoring such secular concepts as tolerance, morality, good citizenship, and so forth?

In other words, can school prayer, in your estimation, be defended on the basis of promoting totally nonreligious goals as well as religious goals?

Secretary BELL. Well, I believe that this amendment will lead to the ideals of the circumstance that I think you have been alluding to, that you are referring to in your testimony. I believe that at the present time we are encouraging students or we are at least implying to students that religion is off bounds and that spirituality and religious thoughts and ideals in the school have to be muted and subjugated and not expressed.

And I think that all has a deleterious effect. I would also say, Senator Thurmond, that as wide and diverse as our country is—and thinking of the millions of features out there—if this amendment goes into effect, sure enough there are going to be some complaints, and there are going to be some problems related to it.

But I do not think the problems will be serious--there will be some teacher who will be biased in one direction or another, and the democratic process will have to take place to correct that.

But I do not think that any of it will be as sweeping in antireligion as the position that we presently have in our schools.

The CHAIRMAN. Do you not think if an amendment like this goes into effect, too, it would be a reawakening of moral values and good citizenship values, because when one believes in God, does that not give a certain faith, and does it not give certain inspiration to people to want to do the right thing toward his fellow man.

Secretary BELL. It does whatever your conception of God might be, and as I indicated earlier, yours might be different from mine.

The CHAIRMAN. Now, Dr. Bell, do you feel that local school districts are adequately sensitive to the need to protect minority religion students against religious discrimination and intolerance?

Secretary BELL. Yes, I think so. First of all, most of the school boards, with only a few exceptions, are elected by the public. They are all required to meet in open session. Parents would have opportunities to come in and express their views on this. And I think that they do have the sensitivity and the sophistication and the concern and the awareness so that they will be able to respond in an appropriate manner when this amendment is passed.

The CHAIRMAN. Dr. Bell, again I want to thank you for your appearance here and the great job you are doing in serving our country.

I want to commend our able chairman of the subcommittee, Senator Hatch, for the fine job he is doing and we hope we can pass legislation that will tend to relieve this situation.

Secretary BELL. Thank you.

Senator HATCH. Thank you, Mr. Chairman.

Senator Grassley?

Senator GRASSLEY. Dr. Bell, I am sorry I did not hear your testimony, but I will have an opportunity to read it. I have one question in regard to the *Lubbock* case. Has there been any survey of school board policies around the country, as to whether or not that case has had a chilling effect on school board policy and whether there has been any school board policy changes made pursuant to that decision?

Secretary BELL. I do not know of a formal survey, although I should indicate to you that we are in the process of completing a study throughout all of our ten regions about school board policies.

We are examining those policies, incidentally, Senator, to see how they set standards to promulgate excellence in education related to our recent report on the National Commission on Excellence.

But out of that survey, we are aware of the fact school boards are very sensitive about this matter. And it absolutely has had a chilling effect. There is concern about it. There is fear of criticism, and a concern that we keep all reference to religious or religious views out of the schools, some more extreme than others about that. But it has had a chilling effect.

Senator GRASSLEY. You would almost think the absence of the religion was a religion in itself.

Secretary BELL. Well, there are those that emphasize that, and that that position itself is a religious teaching, an anti-religious teaching. Some would say that that goes too far, but there are those that take that view.

Senator GRASSLEY. Mr. Chairman, I have no further questions of this witness.

Senator HATCH. Thank you, Senator Grassley.

We thank you, Mr. Secretary. We appreciate your taking time from what we know is an extremely busy schedule. I was very interested in the report that came out last week. We know that you are doing everything you can to resolve some of these difficulties.

Secretary BELL. I might be saying, Mr. Chairman, that we will be out across the country now promulgating the results of this study. We hope that we can have a great rally going on, excellence in education. And we appreciate your support of it very much.

Senator HATCH. Thank you for coming. I appreciate having you here.

[Secretary Bell's prepared statement follows:]

PREPARED STATEMENT OF T. H. BELL

Mr. Chairman, Members of the Subcommittee:

I'm happy to have this opportunity to speak on behalf of the President's amendment on school prayer. The proposed amendment was reintroduced by Sen. Thurmond in the Senate on March 24, 1983 as Senate Joint Resolution 73. When I testified before the full Judiciary committee on Thursday, I briefly commented on President Reagan's proposed amendment. I appreciate this opportunity today to further express my support for the President's position on this matter of such enormous importance to the American people.

As this Committee is aware, this amendment reflects the wishes of the President and many Americans across the Nation as well.

In a public opinion poll completed just last year, the New York Times found that between 69 to 85 percent of the population approves of voluntary school prayer. At the same time, the Washington Post found that 75 percent of the American people support a constitutional amendment to allow prayer in public schools (Washington Post, May 22, 1982). This is an issue very much on the minds of Americans today. A response to the public's wishes seems to me to be long overdue.

In my testimony last week, I noted that the 'Equal Access' concept would serve to restore voluntary religious activity to an equal status with other extracurricular activities permitted on public school premises. Because we have drifted so far from the standards of liberty established by the Founding Fathers of our nation, such a suggestion might seem dramatic. For the first 170 years of our nation's experience under the First Amendment, states and localities were entrusted to make the delicate decisions required in determining the relationship of government to religion. This Administration believes the historical record clearly reveals that the Founding Fathers never intended the Constitution to suppress religious speech in public places. Indeed, the history of public education in this country until 1963 was in actuality one of religious freedom. As a biographer of Horace Mann, the founder of modern public education has observed:

> He [Mann] took a firm stand against the idea of purely secular education, and on one occasion said he was in favor of religious instruction "to the extremest verge to which it can be carried without invading those rights of conscience which are established by the laws of God, and guaranteed to us by the Constitution of the State."

Schools represent the marketplace of ideas in which our future leaders are trained. Character, which is the bedrock of a civilization, is formed through making good choices rather than by limiting the selection of available options. Constitutional freedoms are nowhere more vital than in the context of American public schools (Shelton v. Tucker, 364 U.S. 479, 487 (1960). Mr. Justice Jackson observed in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 637 (1943),

> That [boards of education] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

In fact, prior to 1962, local school authorities demonstrated a respect both for religion and diverse views about religion.

The implied coercion theory presumes that group prayer by consenting students has a coercive effect upon the objecting students in violation of their right to the free exercise of religion. As one deeply engaged with public education for years I must register my disagreement over this charge. When teachers wore black armbands to protest the Vietnam war, wasn't their right of expression successfully defended against any charge that they were manipulating children? We know from letters and from public opinion polls that parents would welcome the influence upon their children of other students seeking to develop their character through involvement in religious activities in the public school setting.

This amendment only allows students to participate in prayer if they so desire. In local situations when children are too young to make independent decisions, the wishes of parents or guardians would be honored.

The President's school prayer amendment primarily revolves around the question of religious liberty. This Nation was founded upon the theme of religious liberty and freedom. Our heritage is a deeply religious one. The pledge of allegiance proclaims that we are "one Nation under God". Our coins are engraved with the motto, "in God We Trust". Since Benjamin Franklin requested that prayer be observed by the Constitutional Convention, prayer has been a part of our national assemblies. Today, both the Congress and the Supreme Court invoke God's name and ask his blessings at the opening of every session and until 1962, the widespread practice of prayer had been allowed in public schools. In every inaugural address and in every Constitution of every State, reference is made to God. In the Chamber of the U.S. House of Representatives there is a sign over the Speaker's Chair that says "In God We Trust."

The 1962, 1963 Decisions marked the the erosion and decline of religious liberty in our Nation. Court decisions since then have served to limit the freedom of speech and the free exercise rights of students in America's schools. The President's proposal will, as he expressed, "restore the simple freedom of our citizens to offer prayer in our public schools and institutions."

From the beginning, America has been a profoundly religious nation with a tradition of publicly declaring and encouraging a belief in and dependence upon God; and from the beginning, education was treated as an enterprise with inseparable religious and moral components. To the Founders, a wholly secular education would have been a contradiction in terms, a certain blueprint for disaster.

The President's amendment would enable students the opportunity to exercise their Constitutional right of freedom of speech. I hope that this distinguished committee will rule promptly and favorably on this matter and by so doing reflect the will of the people of this Nation.

Thank you.

Senator HATCH. Our next witness will be Michael Malbin from the American Enterprise Institute. He is also a contributing editor of the National Journal. Dr. Malbin is one of the leading authorities on the constitutional development of the first amendment and is the author of a number of monographs on the subject published by the American Enterprise Institute. He is also a lecturer at Catholic University.

I noticed in particular two excellent monographs, Dr. Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment; and, Religion, Liberty, and Law and the American Founding.

So we appreciate having you with us. We look forward to taking your testimony at this time.

STATEMENT OF MICHAEL J. MALBIN, RESIDENT FELLOW, AMERICAN ENTERPRISE INSTITUTE

Mr. MALBIN. Mr. Chairman, thank you.

As you have indicated, I am a political scientist at the American Enterprise Institute for Public Policy Research where I am a resident fellow.

I appreciate your asking me to testify here today on what the members of the First Congress intended the establishment clause to mean and the implications of that meaning for contemporary concerns about school prayer and other issues.

What I have to say will be my own opinions, based on my own published investigation of the historical record. As you know, AEI takes no organizational positions on matters of public policy, and on this subject as on many others, there is a wide diversity of opinion at the institute.

Mr. Chairman and Senator Grassley, I know your time is limited. I will summarize my historical research briefly, and to support what I say, I request the two items you mentioned be inserted in the record or submitted for the record, as well as a chapter called "Religion and the Founding Principle," from Walter Berns' book, "The First Amendment and the Future of American Democracy."

Senator **Hatch**. Without objection, they will be inserted into the record after your oral statement.

ORIGINAL INTENTIONS

Mr. **Malbin**. The Supreme Court has held since 1947 that the first amendment's establishment clause applies to the States as well as Congress, and that it prohibits both State and Federal law from giving direct or indirect assistance to religion.

The law, according to the court, must be strictly neutral between religious and secular institutions and activities. The Supreme Court asserted in Everson, Engel, and Schempp that its neutrality test was based on the intentions of the authors of the first amendment.

As evidence, it drew upon a phrase, "wall of separation," from a private letter written by Thomas Jefferson in 1802, and some statements Jefferson and Madison made in support of the 1784 Virginia Bill for Establishing Religious Freedom. But Jefferson was not even a member of the First Congress. Madison was the floor manager for the amendments, to be sure, but one should not interpret the result of a collective deliberation solely from statements made by a floor manager in an entirely different setting 5 years before, particularly not when we have better records available in the "Annals of Congress."

The debates over the Bill of Rights in the "Annals" are less complete than we might wish, but there was more discussion of the establishment clause than of most of the other proposed amendments. Although the debate left many questions unsettled, it was clear on some key points.

Madison thought the Bill of Rights was not necessary given his views on enumerated powers and his views on the necessary and proper clause. The best protection, he thought, against a national religious establishment, or against all forms of majority tyranny, was an extended republic that was friendly to and fostered a multiplicity of sects, opinions, and interests.

Nevertheless, to respond to concerns raised during ratification, he agreed to sponsor a set of amendments in the First Congress. One of them read, "No religion shall be established by law." It was interpreted by Madison to mean, "that Congress should not establish a religion." Please note that Madison said Congress should not establish a religion, not that Congress should not establish religion as such.

But Madison's interpretation did not match his own original language. This led members of Congress to express two different kinds of concerns. One, to quote Benjamin Huntington, was "that the words might be taken with such latitude as to be extremely hurtful to the cause of religion."

The other was that the amendment might permit Congress to pass laws that would threaten religious establishments in the States. Various formulas were offered to deal with both issues.

Some would have limited the amendment to the establishment of articles of faith, but that did not satisfy members who were concerned about other less discriminatory issues.

Another formula—and this one was adopted temporarily— would have prohibited any law touching religion. That formula would satisfy today's most extreme separationists at the national level, but it also would have barred any law that even indirectly affected establishments in the States.

The final language compromised both issues: Laws touching religion were allowed, but not ones directly "respecting an establishment of religion" in the States. At the same time, the language prohibited Federal laws that favored one religion or group of religions over others. Again, note the phrase, "respecting an establishment of religion," rather than "the establishment of religion."

But the language did not prohibit laws that might tend to assist religion as such. The First Congress did not expect the Bill of Rights to be inconsistent with the Northwest Ordinance of 1787, which the Congress re-enacted in 1789. One key clause in the ordinance read as follows: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of learning should forever be encouraged."

This clause clearly implied that schools, which were to be built on Federal lands with Federal assistance, were expected to promote religion as well as morality. In fact, most schools at this time were church-run, sectarian schools. However, the aid was open to any sect that applied.

In summarizing the history, I should like to emphasize the broad area of agreement between Madison and others in the First Congress; they all wanted religion to flourish, but they all wanted a secular government. They all thought a multiplicity of sects would help prevent domination by any one sect and thus help avoid the religious divisiveness and religious warefare with which they were all so familiar from recent English history. We should not lose sight of the importance of this concern about divisiveness to the framers as we seek to correct recent misinterpretations of their intent.

At the same time as they were concerned about divisiveness, however, most members of the First Congress also thought religion was useful, perhaps even necessary for teaching morality. Most also thought a free republic needed citizens who had a moral education. They thus tended to view nondiscriminatory aid to religion not as a policy designed to achieve religious objectives, but as one, to use the current language, "with a secular purpose and effect."

CONTEMPORARY IMPLICATION

What does this all mean for contemporary deliberation? Obviously, the intentions of the framers cannot be binding upon you. The amending power specifically grants you the authority to make your own determinations.

On the other hand, I personally believe the framers' intentions offer more than historical guidance. I believe their principles were wise and remain so today.

In applying the framers' view of establishment, we first have to decide how to handle the federalism issue. The establishment clause, we saw, prohibited Congress making laws to help or hurt the State religious establishments. The *Everson* case of 1947 said the 14th amendment applied the establishment clause to the States. This created a logical absurdity. Applying the original intention to the States would mean that no State could make any law to help or hurt a State religious establisment. Nor can one get out of this logical absurdity by saying that the 14th amendment changed the situation. If the authors of the 14th amendment had thought this, Blaine would not have offered his own famous amendment, which passed the House and failed in the Senate in 1876 and read as follows: "No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof." This amendment clearly would have been redundant if the original supporters of the 14th amendment, Blaine included, had thought of it as "incorporating" the establishment clause.

That having been said, I would not have the temerity here to suggest how you might address the federalism issue today. Its implications go well beyond establishment and would involve you in issues relating to the whole of the Bill of Rights.

But let us assume the federalization of the establishment clause for the sake of discussion, either because it is a judicial and political given, or because we accept it, as I do, as sound policy, if not good law. And I do not believe it is good law in issues relating to religious establishments.

Under this assumption, how do some contemporary issues measure up to the rest of what the framers intended in the establishment clause? Now, some issues are easy, in my opinion, despite some lower court rulings. Tuition tax credits and education vouchers would be allowed under any nondiscrimination test. Under the framers' test, they clearly do not discriminate among religions. Under the more modern test, they would not discriminate in favor of religion as such, as long as the amount of aid did not exceed Government spending for public school students.

Equal access is slightly more difficult, but only slightly. Providing equal access to school facilities for religious clubs after hours seems to raise no questions of discrimination, as long as the building remains open for other clubs anyway; allowing them during school hours might be more problematic, but that would depend on particular fact situations.

SCHOOL PRAYER

Prayer, I think, is much trickier than tax credits or vouchers or equal access. I think most people would agree today that requiring a student to say a prayer would be unacceptable, and no one is arguing that you should.

There is no such thing, in my opinion, as a nondiscriminatory prayer. Even a nondescript prayer thanking God for the food we eat invokes a being that is not at all consistent with the supreme powers accepted by those Americans who may be Buddhists or Hindus or members of one of the other large Eastern religions.

What about voluntary prayer? Here we have to be more precise than the President's proposed amendment about what is or is not voluntary. Is a prayer voluntary if students are told by their teacher that they may stand silently while their classmates recite words written by public officials, the situation in the *Engel* case? I think such a situation might be voluntary for adults but, contrary to what some have said here, I do not think it is the same thing for children. Yes, children may opt out, but only at the cost of asserting and maintaining their difference from their peers. This can be a high price to ask of children. It is not entirely free. And I believe it helps promote the tension and divisiveness the framers were trying to avoid.

Well, does it make any difference if we keep the above facts, but use a prayer that was not written by public officials, such as Bible readings or the Lord's Prayer, such as we had in the *Abington* v. *Schempp* and *Murray* v. *Curlett* cases.

Here, again, I believe the Supreme Court reached a decision that was consistent with the framers' intentions, even as it misstated the framers' intentions and implied what I believe to be a misguided rule of law. The situation is no more voluntary than the one in *Engel,* and in addition, prayers or readings from one religious source must in their nature discriminate among religions. They cannot help doing otherwise.

Well, what if a teacher just asks students to take turns leading the class in whatever the student may wish, another court case? That would change the discrimination's predictability. But it would increase the potential divisiveness. It would leave everything else the same. What if the teacher just said, "Let us pray" followed by silence? That would be less of a problem, but still a problem, even using the framers' test. The fact is that many religious people do not pray, as most of us think of prayer. Prayer, in my own religion, involves what Martin Buber called an "I-Thou" relationship. One prays to a divine being who cares. The idea of prayer, therefore, is very different from that of meditation, which is what one does in many eastern sects. Meditation among some Buddhists, for example, involves becoming something, not asking or thanking or praising.

MOMENT OF SILENCE

Finally, what if the teacher says just a little more and calls for a moment of silence for meditation or prayer or personal reflection? Here I can see no problem, and I can see a lot of benefit. Some lower courts, it is true, have held that though teachers may call for moments of silence for meditation or personal reflection, they may not mention prayer.

I find that perverse. The teacher in this situation is not recommending prayer, but suggesting it as one of several possibilities; yes, including prayer among the options may encourage more students to pray, but though the lower courts found this decisive, I think it is constitutionally irrelevant. It is perfectly neutral among religions. It is perfectly neutral between religion and irreligion.

Two lower courts have denied the latter by saying that including prayer serves to encourage religion. It does, but not at the expense of anything else. It also serves, I may add, to encourage everything else that is mentioned in the same statement. The fundamental mistake here, moving back to the perspective of 1789, is that the framers thought they were serving secular purposes precisely by encouraging religion and religious diversity in nondiscriminatory ways.

TWO BASIC PRINCIPLES

The lower court decisions on silence expose a problem that I think lies at the heart of the current pressure for a school prayer amendment. The courts, particularly some lower courts, have proven themselves to be extremely insensitive in issues that relate to religion. People who think the courts have moved beyond neutrality to hostility do have some basis for their complaints. There is a grave danger, however, that reacting to insensitivity may produce some insensitivity of the opposite sort.

Let me give a personal example to explain what I mean.

I grew up in New York; for 2 years I was the only Jew in a class that was required to say the Regents' prayer that was overturned in *Engel*. I have no problem personally with that prayer. All it said—and by the way, this is all it said in the version we recited; it is slightly different from what you will find quoted in *Engel*—all it said was: "Almighty God, we acknowledge our dependence upon Thee, and we beseech Thy blessings upon us, our parents, our teachers, our country, and upon all mankind."

As I said, I had no problem with that, but most of my classmates did. No, they were not Buddhists or atheists; most were Lutherans or Catholics who thought the prayer was pabulum. So, many of them added something to give the prayer meaning. At the end, they would add, "In the name of the Father, the Son, and the Holy Ghost, Amen."

Now, I don't blame them for adding those words. After all, what is the purpose of a prayer that has no meaning for the person who is praying? But what was the real effect of that prayer in this situation? The majority were faced with an unpleasant choice. Add something to give the prayer meaning or stand there and be offended. What about the teacher? Well, by not disciplining the students who added something, the teacher, who I think also was faced with an impossible choice, permitted the prayer to reinforce the religion of the majority and thus permitted it to serve some of its legislative purpose. But she did so at the cost of promoting divisiveness and intolerance; that is, by heating up the very passions that the framers were trying to cool off by promoting religious diversity.

These passions were the very ones that produced religious warfare on a grand scale and school boy fistfights on a lesser one. And what for? Did this exercise really do anything more to reinforce the religious beliefs of the majority than would a moment of silence? I think not.

In conclusion, the framers wanted to encourage religion, both, one, because they thought religion was salutory, and thus served a secular purpose; and two, because they thought diversity and the requirement of nondiscrimination would promote civil peace. Both halves of this were equally crucial to them. And I urge you to keep them both in mind in your deliberations.

Senator HATCH. Thank you, Dr. Malbin. That was an excellent statement. Could you summarize for this committee your textual analysis of the first amendment; for example, what is the significance of the phrase, "an establishment of religion" rather than "the establishment of religion."

Mr. MALBIN. This change was made in a conference committee. As you know, the members of the First Congress did not believe in open conferences. They did not even publish what went on in the Senate. All we have are diaries. We have very little direct evidence on this. It is clear that had they written "the establishment of religion," then the language the Supreme Court has adopted would seem to be the most consistent with the amendment. They did not. And what they left us with is a puzzle. What the meaning of "respecting an establishment of religion"?

The only way to make sense out of it, I think, is to realize the two issues they were grappling with, and most specifically the federalism issue that was the most significant issue at almost every turn during the First Congress. I think the phrase, "respecting an establishment of religion" was meant to convey both meanings, first that Congress shall make no law with respect to—that is, that would tend to bring about "an establishment of religion," and second, no law that would affect the religious establishments, that existed in the States. Most States had them; Massachusetts did not drop its religious establishment for some 40 years after the First Congress.

Senator HATCH. There are those who believe that the restoration of school prayer would undermine the very foundations of a secular government. Could you elaborate on why you believe that a secular state was compatible with the original understanding of the first amendment as established by the Founding Fathers? Does not a truly secular government seem to imply something akin to the "wall of separation" between church and state?

Mr. MALBIN. I do not—let me wait for the buzzer to end.

Senator HATCH. Sure.

Mr. MALBIN. I do not think that—well, let me say, I do think that the framers intended to set up a secular government; but it was clearly one that encouraged religion. I think that prayer in many situations is not necessarily incompatible with secular government. I do think, however, that vocalized prayer—in a situation where you are dealing with children and where you have to make a choice among religious opinions—tends to foster a kind of concern among children that is, I would not say inconsistent with secular government, but inconsistent with the aims of secular government, and that therefore there are problems.

I do not know if I have answered your question fully.

Senator HATCH. I think you have.

Do you believe that any form of oral prayer must inevitably discriminate among religious views?

Mr. MALBIN. Yes.

Senator HATCH. You do.

Mr. MALBIN. And I say that because I think, as I indicated, the notion of prayer is not in itself a part of all religious opinion, forget about the distinction between religious people and nonreligious people. Buddhists simply do not pray, or many do not. They meditate. There is a difference.

It is strange, by the way, that the lower court that said it is all right to use the word "meditate" but not prayer was not aware of the fact that in saying the word "meditate" they were saying something that does have meaning for one set of religions but not others.

Senator HATCH. You have suggested that there is some merit in the charge that courts have moved beyond neutrality to hostility with regard to affairs of religion. Could you elaborate on that?

Mr. MALBIN. Yes, such as in lower court decisions overturning tuition tax credits. I do not know enough of the specifics of what happened in the Lubbock schools, but I know that if you applied that principle in a lot of situations I could imagine, that that would involve hostility. I think that not allowing a school bus to pick up people in front of a school because a school bus happens to come from a Christian school is absurd.

I say what I did about *Lubbock* because that particular decision, the lower court said its decision was based partty on the 10-year history in that district; that means that the decision itself seemed to be pegged to specific facts there.

Senator HATCH. Could you elaborate on the notion that silent prayer may have a greater meaning for the deeply religious individual in his daily devotions than voluntary vocal prayer.

Mr. MALBIN. Yes; I think there is no question that a person who cares about prayer would be able to say more in a moment of silence than in a vocalized public prayer. I know that was true, not just of me, but of all the other people in the classroom I mentioned earlier. I felt I could say the Regents' prayer precisely because it was pabulum, and I do believe in a religion that believes in prayer and believes in one God. Everybody else there also thought it was pabulum and changed it, just changed the prayer; not at anybody's instruction, but because they felt it was necessary, for whatever reason.

Senator HATCH. Thank you, Doctor.

Senator Grassley?

Senator GRASSLEY. I have no questions, Mr. Chairman.

Senator HATCH. Well, thank you for coming, Dr. Malbin. We appreciate the effort you have put forth. We appreciate having you as a witness.

[The following was received for the record:]

Religion, Liberty, and Law in the American Founding

Michael J. Malbin

Preface

Prayer in the schools, tuition tax credits, and other forms of aid to private and religious schools have raised intense emotional issues of public policy over the last several years and promise greater controversy in the near future. The well-publicized participation of religious figures in last year's election campaigns generated heated discussion about the appropriate relationships between church and state, and the renewal of draft registration and the current status of U.S.–Soviet relations raise the possibility that conscientious objection to compulsory military service may again be one of our burning public questions.

Michael Malbin, one of the most careful and knowledgeable students of American constitutionalism I know, spoke about these issues at a February 1981 Clemson University lecture series on Liberty and the Limits of the Law. In his lecture, which is reprinted here, Malbin explored the meaning and contemporary relevance of the Founding Fathers' understanding of the appropriate relationships between religion and politics, church and state.

His conclusion shows how he thinks a return to their principles could help us break free from the shackles that bind contemporary debate:

> *Lost somewhere in the theoretical murkiness of the [Supreme] Court's position is any indication of an awareness of the way the Founding Fathers meant the Declaration, Constitution, and Bill of Rights to promote both religious health and civil peace. Unfortunately, some of the Court's modern conservative critics seem equally unaware of the deepest purposes of the nation's founding documents. . . . Both sides would do well to give more careful study to the*

> *foundations of the constitutional democracy they are so busily trying to alter.*

According to Malbin, school prayers raise very different constitutional issues from aid to private and parochial schools. On prayers, he argues:

> *[The free exercise clause was] at least meant to prevent Congress from prohibiting or compelling any form of religious worship, by, for example,* either prohibiting or requiring prayers. *That is, the clause protected not only the exercise of religion but the freedom of its exercise.*
>
> *The original rule . . . [under the establishment clause] probably would prohibit Congress from doing most of what worries modern separationists. For example, it clearly would prohibit the government from prescribing school prayers for children, even supposedly voluntary prayers. A moment of silence would be all right, and probably a good idea. However, it would be impossible to write an official prayer today without offending some religious people.*
>
> *Trying to push prayer on a nation whose religions are far more diverse now than they were a century ago . . . threaten[s] to excite exactly the same passions the Constitution was meant to damp down.*

Turning to the question of public support for religiously affiliated schools, Malbin says:

> *The establishment clause was meant . . . to require a strict neutrality between religions, not neutrality between religion and irreligion. This is absolutely clear from the debates in the First Congress.*
>
> *The establishment clause was not meant to prohibit truly nondiscriminatory forms of aid to religion. One such form of aid was adopted by the First Congress itself when it reenacted the Northwest Ordinance, which contained a clause giving free land to anyone who wanted to build churches or schools, including church schools, in the Northwest Territory. . . . I would maintain that today's tuition tax credits or tuition vouchers are nondiscriminatory forms of aid not far different from the Northwest Ordinance. Tax*

> *credits and vouchers obviously raise different issues of public policy. . . . Constitutionally, however, they are the same. They provide aid to parents without discriminating between secular and religious schools, let alone among religious sects.*

On the question of conscientious objection, Malbin concludes:

> *There is absolutely nothing in this history to suggest that the authors of the Bill of Rights thought that religious people should be granted a right to be free of any legal obligations solely because a law might clash with their religious consciences. . . . They wanted those exemptions to be understood to be matters of grace extended by statute. They did not believe that they belonged to citizens as a matter of natural or constitutional right.*

There is considerable insight in this short but rich piece about how the Founding Fathers would approach some of today's most divisive problems. Understanding their approach is crucial today not only because it illuminates the intended meaning and accurate interpretation of our written Constitution but also because the founders uncovered and possessed a wisdom about the relationship between government and religion that we in the latter half of the twentieth century seem to have misplaced.

W. S. Moore
Director of Legal Policy Studies
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Religion, Liberty, and Law in the American Founding

Michael J. Malbin

I am delighted to be here to speak on the subject of law, liberty, and religion. The subject is of immediate political interest, of course, but it also raises some of the deepest and most enduring questions of political philosophy. The political interest in the subject can be seen from the many bills before Congress in recent years concerning prayers in public schools and tax credits, vouchers, and other forms of aid for private schools. In addition, if the all-volunteer armed force does not prove adequate to the country's defense needs, we may expect Congress in future years to begin thinking again about a military draft. If it does so, we can be sure that the problem of conscientious objection will follow quickly on its heels.

What Congress will decide about these subjects cannot be predicted with any certainty. However, we can be certain about a few things: people on both sides of these issues will invoke the highest principles, they will be highly emotional, and they will be highly confused.

Public thought about the relationship between law, liberty, and religion has become almost entirely muddled over the past few decades. To some extent, this is understandable—particularly if we look at the subject from the perspective of religion. Everyone brings his own religious or nonreligious background to these debates—whether Protestant, Jewish, Catholic, Muslim, Buddhist, Shintoist, Taoist, or Secular Humanist—each brings his own deepest convictions to bear on the subject. Each has his own understanding of the proper relationship between his church, his conscience, and his country's government and its laws. The perspective of religion is in one sense simple: from that perspective, the religious person obviously should always follow the commands of his or her religion. But the perspective becomes a lot more varied when we realize that every religion has its own approach to the relationship between religious authority and conscience or between civil authority and religion.

However, while the multiplicity of voices from the religious community may be understandable, the confusion we see when people look at the subject from the law's perspective is far less understandable. I will be speaking today from the perspective of civil society and law—specifically, from the perspective of the basic documents underlying the legal framework of our own civil society. For reasons that will become obvious, that perspective necessarily conflicts with that of religion on a number of key points. The dilemma of Antigone remains with us today as we think about the First Amendment.

The public understanding of the purposes of the First Amendment has become so shallow that people during the past election campaign went so far as to suggest that the principle of separation of church and state requires ministers to be political neuters who express no opinions about politics whatsoever. This view of the First Amendment is so misguided that it would not warrant comment were it not a reflection of something more pervasive—namely, a wide-ranging debasement in our public thought about the meaning of liberty and law. Numerous other examples of a similar debasement occur all over the current political landscape—from the libertarians, on the one hand, who equate liberty with the right to avoid any form of mandatory service or taxation under law, to misguided separationists, on the other, who argue that Congress should pass no law that happens to be closer to one set of religious convictions than another, even if the law is passed to serve a valid secular purpose.

The Supreme Court has not been free from shallow thinking on the nature of liberty and the connection between liberty and law, but at least it has not been this silly in its approach to the First Amendment. The Supreme Court recognizes that religion almost invariably involves commandments or duties relating to what is right and wrong in this world, and that such commandments, for religious people, often compel overt actions within government's and law's spheres of competence. As a result, the Court has not been among those who talk about separation of church and state as if it means that religion must have nothing to do with politics.

But the Court has been utterly confusing in almost everything else it has said about religion. Its interpretations of the meaning of the First Amendment's phrase—"Congress shall make no law respecting an establishment of religion"—have almost bordered on government by *ad hocracy*. The Court ruled in 1947 that "no establishment" meant that the government may not give any form of aid to religion. However, the rule was handed down in a case that decided it was all right to give aid to children who were using buses to go to religious schools.

Subsequent decisions have been equally baffling, as the Court moved away from the phrase "no aid" and focused instead on the requirement that laws must be strictly neutral, favoring neither religion nor irreligion. According to the neutrality test, aid to religious organizations is acceptable as long as its purpose and effect are secular and as long as granting the aid does not require government to become tangled excessively with the actual operation of religious institutions. But the test again provides little guidance. For example, the Court ruled that tuition tax credits to parents of private school children in New York have a religious effect because most of the private school students in that particular state attend Catholic parochial schools. What does this imply for future cases? Would a national tuition tax credit, applicable to a broader range of schools, be all right? What about vouchers given to all students who could then turn their vouchers over to the public or private school of their choice? The decision does not answer these questions. Or, take some other cases: does it really make sense to prohibit flat grants of aid to private and religious schools, colleges, and universities, and then start sorting out specific categorical grants, saying that some are all right and some are not, depending upon whether they go for buildings, laboratories, textbooks, or standardized tests? Does that sort of differentiation really make sense? It seems clear that any likely governmental grants could be made to fit one or another judicially crafted category, if the legislators would only know what the categories were. But the cases so far have had almost no predictive value for legislators trying to figure out what to do. All the legislators can do is act in an ad hoc way and hope their *ad hocracy* happens to match that of the courts.

We see the same kind of confusion in free exercise law today. The Supreme Court has held that the free exercise clause gives people a constitutional right—and I emphasize that word "right"—to be exempt from valid civil laws if the person believes the law would violate his religious conscience and if the court believes the law is not all that important. So, Amish people do not have to attend publicly accredited schools, but people who object to participating in particular wars do not have a right to be exempt from the draft. How the underlying rules will apply to future cases, such as the one now pending involving public solicitation by Hare Krishnas, cannot be predicted. Instead of clear rules of law, we again see judicial government by *ad hocracy*.

I would maintain that this *ad hocracy* by the courts is one major reason for the utter confusion we see in public discourse about the proper relationship between law, liberty, and religion. But I would go one step further in my comments about the courts. I would maintain that the courts have been forced into a set of ad hoc judgments because they have failed either to understand or to apply the principles of the Constitution that they are charged with expounding.

What I would like to do here with the rest of my time today is this. I would like to lay out the basic principles of the American founding with respect to law, liberty, and religion as I understand them. That will take up most of the rest of the time we have available. In the course of doing so, I hope I shall be shedding light on at least a few contemporary First Amendment issues, such as school prayer, aid to private schools, and conscientious objection.

In laying out the basic principles, it seems to me we ought to start with the Declaration of Independence, the most basic statement of the nation's principles. The Declaration will help us understand the relationship between law and liberty. To get to the role of religion, we then will have to move beyond the Declaration to the Constitution and Bill of Rights.

I would like to start discussion of the Declaration by reading its most famous sentence, the second sentence:

> We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—that to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.

Now let us go back to the fourth of the self-evident truths: "To secure these rights Governments are instituted." Why governments? To answer this we have to back up a step. Why does the right to life, liberty, and the pursuit of happiness require government? For the clearest answer, we should look to the source of Jefferson's phrase, namely, John Locke's *Second Treatise of Government.*

Jefferson spoke of life, liberty, and the pursuit of happiness. Locke spoke of life, liberty, and property. With this slight change we can say--Garry Wills notwithstanding—Jefferson's thought and the Declaration are essentially Lockean. We know this from Jefferson's notes. Jefferson took extensive notes on Locke, and the Declaration very closely follows the *Second Treatise*, especially the chapter in the treatise on the dissolution of government.

Why are governments necessary? Locke's answer, essentially similar to one given decades earlier by Thomas Hobbes, turns upon his distinction between the state of nature and civil society. For Locke, the state of nature refers not to a historical, prepolitical human condition but to a condition that is always possible and to some extent always present. People are in a civil society, according to Locke, when they accept a common magistrate or authority above them. They are in a state of nature with respect to each other when they accept no such common magistrate. (Foreign leaders, in the absence of international law, are thus in a Lockean state of nature.) Without a common magistrate, men are free, independent, and equal. They want to preserve their life, liberty, and property, and they have a natural right to do so. The right to preserve life carries with it the right to enhance life by mixing one's labor with the scarce goods provided by nature and then to acquire or own the resulting product. However, according to Locke, it is all but impossible to use labor effectively in a purely natural state. Improving upon nature presupposes time and security. Without common magistrates, however, the person who improves upon nature should not be surprised to find someone else stealing the fruits of his labor. While people are not said to have a natural right to steal, they do have a natural right to take what they may need to survive. Since the absence of a common magistrate means that everyone must judge for himself what he needs for his own survival, and since nature cannot provide enough for human survival without improvement and labor, scarcity and conflict will inevitably result in the state of nature from the desire to preserve life. Therefore, governments are instituted to prevent conflict, to preserve the peace and security needed to permit people to improve upon nature, and thus to help preserve and enhance their lives.

So, for Locke, liberty is natural, the desire to preserve life is natural, and war is the all but inevitable consequence of nature. For Locke and for the Declaration of Independence the purpose of civil society is to preserve the peace that lets people enjoy life, liberty, and the ability to pursue property. Civil society secures the right to liberty because civil society is essential for peace. To put this another way, liberty may be enjoyed only in civil society; the fruits of liberty may be obtained only in civil society. Therefore, while the purpose of civil society has to do with liberty, the notion of liberty within civil society necessarily is self-limiting. Liberty cannot be protected without government. Therefore, liberty cannot be enjoyed without law. And, therefore, liberty must be confined within bounds that permit government and the rule of law to exist.

This creates a seeming paradox. How can you equate freedom with obedience to law? The answer is that law abidingness and freedom are not simply equated. Let us remember, the Declaration of Independence is a revolutionary document. The protection of liberty requires law, but for a law to deserve such unquestioned obedience, it must come from a government to which the citizens have given their consent. And consent, Locke argues, will be given freely only to a government that limits its activities to protecting rights that exist, but cannot be enjoyed, in a state of nature. Such governments are rare, as we all know.

Now let us go back to the sentence I just read from the Declaration, and reread another part of it. "Whenever any *form* of government becomes destructive of these ends [life, liberty, and the pursuit of happiness], it is the right of the people to alter or to abolish it, and to institute new government." What does this mean? Why is the word "form" in there? The Declaration of Independence does not say that whenever the government restricts liberty, rebellion is justified. All governments necessarily restrict liberty, and liberty cannot be enjoyed without government.

According to the Declaration, and Locke, particular actions taken by the government cannot legitimately be disobeyed selectively because they restrict liberty in this or that instance. The reason is that selective disobedience undermines the principles of law that are necessary to preserve the peace. In the absence of law, people become judges of their own cases and the situation returns to a state of nature. Of course, when the government as a whole, or the form of government, becomes destructive of the ends of government, it is appropriate to change governments. But as long as the form of government works toward securing the proper ends, the need for a government of some sort means that people must put up with some restriction on their liberty to act as judges of their own cases. The protection against government's arbitrarily restricting liberty lies not in selective obedience but in the requirement that government be based on consent.

This is the theoretical basis for and backdrop to the Declaratio of Independence. The presentation so far has been entirel grounded on nature and natural rights. That is, it has been entirel secular. It leaves no room for selective disobedience to law, eve if the motive for disobedience rests on religious conscience.

However, while Locke's basis for civil society did not rest on religion, he did not ignore the subject. Hobbes and Locke were both familiar with religious warfare, and both saw religious zealotry as a major threat to peace. Since preserving the peace was the first goa of civil society, one major aim of their writing was to weaken th attractiveness of religion by transferring people's fears and concern away from salvation and to this life. The Declaration retains thi focus on the goods of this world.

Yet, this somehow does not seem an adequate description of th role of religion in this country. It all seems so negative. We al know that religion was an important part of the Founding Fathers scheme of government. Far from wanting a purely secular nation their aim was to channel religion, to transform it, to preserve th useful parts while putting the dangerous parts under the control o civil law. The idea was to retain a vital religious life, because religion was thought to be important to teaching virtue, and virtue was considered essential to good citizenship. Somehow, this had to be retained without promoting the conditions that would cause religiou civil war. To see how this was to be done, let us take our next step in this theoretical journey—to *Federalist* No. 10.

Many of you are familiar, I am sure, with the argument of *Federalist* No. 10. It is essentially the same as an argument Madison presented at the 1787 Convention in Philadelphia. But for those who are not familiar with it, or who need to be reminded, let me go over the ground quickly. *Federalist* No. 10 is the paper in which Madison talked about the dangers of faction. He defined the term "faction" to refer to any number of citizens united by common impulse, passion, or interest, who act in a way that is adverse to the rights of other citizens or adverse to the permanent interests of the community. Factions, Madison said, are natural. As a result, it is futile to try to eliminate them or to remove their causes. So, if you want to control the dangers of factions, it becomes necessary to pay attention to their effects. Madison discussed the effects of minority factions, factions making up only a small portion of the nation in which they exist, and majority factions. Minorities sometimes are able to get their way over majorities, but the cure is easy to prescribe, Madison says. The cure of minority factions is democracy. No group can get its way against the will of a majority provided the majority gets a chance to express its will. The particular danger of democracy is not what a minority might do to a majority but the opposite, what a majority might do to a minority. How can the dangers of majority factions be minimized? According to Madison, there is no way in a democracy to prevent a determined, long-lasting majority from working its will. However, there are ways to make it more difficult for such a majority to form. The most effective way, he argued, is to extend the sphere of the republic. Make the nation larger, make it more complex through the development of commerce, and what will result will be a multiplicity of factions so complex that it will be unlikely for a majority to coalesce around a single factional issue. If no one faction makes up a majority on its own, it means that the majority necessary for democratic rule will have to be formed by coalitions of minorities who necessarily will have to compromise with each other before they can have their way.

The basic outlines of this argument are probably familiar to most of you. It is presented most often in discussions of the role of interest groups, particularly economic interest groups. In fact, the prominence Madison gave to commerce often leads people mistakenly to assume that he was thinking solely of economic interests. Nothing could be further from the truth. Madison made it clear that a faction could be a group of people held together by common interests, common passions, or common opinions. In fact, the two main sorts of divisions Madison specifically mentioned as being dangerous to the stability of democracy were the divisions between the rich and poor and the divisions among religious sects.

Thus, we can begin to see that there is a sense in which the Constitution, broadly speaking, was meant as an answer to the problem of religion. Religious opinions were seen as sources of factions, and factions as potential threats to civil peace. The solution seems almost paradoxical. Religious factions were to be encouraged to be fruitful and multiply. As they multiply, the odds of any one faction's gaining a majority decrease. Of course, authors of the *Federalist* hoped to tame religious passions in other ways as well. Remember that a multiplicity of factions was seen as being most likely to flourish in a nation friendly to commerce. But a commercial nation, a nation whose people are wedded to trade, manufacture, and the spirit of profit, is not likely to be a nation whose people would be willing to destroy the civil peace for the sake of their religion.

None of this is stated explicitly in the Constitution. However, it is implied by the very fabric of that document, and it is spelled out very clearly in the *Federalist*. The only place in the main body of the Constitution where religion is mentioned is in Article 6, which prohibits the use of religious-test oaths for officers of the United States.

Many people during the state ratifying debates over the Constitution were concerned that there was no specific protection of religious conscience in the document, and several states called for adoption of a Bill of Rights immediately after the Constitution was ratified. Madison argued that a Bill of Rights was not necessary because the government was not delegated the power to legislate in a way that would affect speech or religion or the other matters that concerned the Antifederalists. The greatest protection for religious liberty, Madison felt, was an extended republic. But this was not enough for the Antifederalists. They wanted a Bill of Rights, and enough of the Constitution's supporters agreed with them to make adoption of a Bill of Rights politically necessary in the First Congress. Convinced by this outpouring that a Bill of Rights would help secure support for the new Constitution, Madison became its principal drafter and shepherd in the House of Representatives.

Let us now turn to the Bill of Rights, specifically to the sixteen words in the First Amendment reading: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." So far we have seen that, in the Declaration of Independence, liberty depends upon governments based on consent. We have also seen that the *Federalist* describes the Constitution as creating an extended sphere in which the multiplicity of sects and factions would promote liberty.

What do the sixteen words of the First Amendment religion clauses add to this? Does the free exercise clause say anything about the relationship between law and conscience that is not in the Declaration of Independence? Does the establishment clause, with its prohibition of an established church, say anything that is not in Madison's idea of an extended republic? I would maintain that the answer in both cases is no. That is precisely why Madison thought the Bill of Rights was redundant. But, while the Bill of Rights may have been redundant, given Madison's limited view of the powers conferred on the government by the "necessary and proper" clause, it does make the intended limits more clear—particularly in light of the broader Hamilton-Marshall view of "necessary and proper" that has prevailed.

Let me start with the free exercise clause. There was virtually no discussion or debate of the free exercise clause during the First Congress that considered and passed the Bill of Rights, so we have very little by way of direct evidence about precisely what its authors meant by the phrase. We can see from the debates in the First Congress that its authors at least meant to prevent Congress from prohibiting or compelling any form of religious worship, by, for example, *either prohibiting or requiring prayers*. That is, the clause protected not only the exercise of religion but the freedom of its exercise.

Beyond this, the meaning of the free exercise clause is less clear, but it did develop out of a well-known history that included, among other things, the Virginia Bill for Establishing Religious Freedom. There is absolutely nothing in this history to suggest that the authors of the Bill of Rights thought that religious people should be granted a right to be free of any legal obligations solely because a law might clash with their religious consciences.

There was no direct discussion of this matter in connection with the First Amendment during the First Congress. But a very similar issue did come up during discussion of the Second Amendment. That amendment now reads as follows: "A well-regulated militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." When that militia provision passed the House of Representatives, it contained an additional clause reading as follows: "No person religiously scrupulous of bearing arms shall be compelled to render military service in person." The Senate dropped this conscientious objector clause largely because some members of the First Congress explicitly rejected the idea that religious exemptions should be treated as rights. For example, Edward Benson of New York said in the House of Representatives that "no man can claim this indulgence of right. . . . [It] ought to be left to the discretion of the government."

The point here is not that the authors of the First and Second Amendments wanted to deny conscientious objector status to people who objected to bearing arms for religious reasons. It was just the opposite. They did grant exemptions to conscientious objectors. But they wanted those exemptions to be understood to be matters of grace extended by statute. They did not believe that they belonged to citizens as a matter of natural or constitutional right. The principle of law cannot permit the individual to decide whether or when to obey the law. In Locke's terms, that would make the individual the judge of his own case. Exemptions granted as a matter of grace do not violate this principle, but making exemptions a constitutional right would give the individual the right to decide when and whether the law applies to him.

As I hope this discussion of free exercise makes clear, the people who wrote the First Amendment expected the nation to be friendly toward minority religions. Moreover, we saw that the whole design of *Federalist* No. 10 involved creating an extended republic in which a multiplicity of religious sects would flourish. That being the case, why was an establishment clause necessary? It seems to go without saying that a nation with a multiplicity of sects would not tolerate the establishment of a national church or the adoption of a national credo. The First Congress considered language that simply would have prohibited the establishment of a national church, but Congress rejected that language and adopted something broader.

The language finally adopted said that Congress shall make no law "respecting an establishment of religion." What does this mean? The clause fits somewhere in that broad ground between the minimalist definition that merely would have prohibited a national church and the position of the modern Supreme Court. Without going into all of the debates here, let me say that the establishment clause originally was meant to prohibit two different things, one relating to the present controversy over governmental aid to religion and the other relating to the relationship between the national government and the states.[1]

First, the establishment clause was meant to prohibit Congress from passing any law that would tend to prefer or favor one religion over others. It was meant, in other words, to require a strict neutrality between religions, not neutrality between religion and irreligion. This is absolutely clear from the debates in the First Congress. At one point, in a speech that reiterated a theme raised often during the debates, Benjamin Huntington expressed concern about one early version of the establishment clause because he thought "the words might be taken in such latitude as to be extremely hurtful to the cause of religion." Huntington "hoped therefore, that the Amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who possess no religion at all." There were ample protections for atheists elsewhere in the Constitution—notably in the free speech clause and the clause prohibiting religious-test oaths for office. But contrary to the modern Supreme Court, the establishment clause had nothing to do with atheists. It was meant to prohibit Congress from discriminating among religions. All through the First Congress debates, the wording of the establishment clause was very different from the wording we know now. During the debates, the clause was worded "no religion shall be established by law," or "no national religion shall be established," or "no particular sect shall be established." Only at the last minute was the wording changed to "no law respecting an establishment of religion." The strange wording was responsible for the Supreme Court's mistaken idea that the amendment required strict neutrality between religion and irreligion. But the real reason for the shift related to an entirely different issue, the issue of federalism.

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[1] For a detailed analysis of the debates, see Michael Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (Washington, D.C.: American Enterprise Institute, 1978).

No single subject dominated the considerations of the First Congress as much as federalism. Thus it should be no surprise that concern over the power of the national government surfaced during consideration of the Bill of Rights. Antifederalists were concerned that Congress might restrict the power of the states to help religion. Specifically, Elbridge Gerry of Massachusetts and other Antifederalists from states with established churches wanted to make sure that Congress could not do anything to harm their states' religious establishments. That is the reason for that strange language in the First Amendment—"no law respecting an establishment of religion." Congress was prohibited not only from doing anything that tended to establish or favor a particular religion on the national level; it was also prohibited from doing anything respecting, or with respect to, the religious establishments in the states. The Supreme Court missed this point entirely in 1947. The decision to apply the establishment clause to the states involved an obvious circularity—how, after all, can the states be prohibited from passing laws that affect state religious establishments?

Let us assume, however, that the application of the establishment clause to the states is an irreversible fact. What would happen if we were to apply the rest of the original meaning of the establishment clause—no discrimination among religions—to today's religiously diverse nation? I believe that the original rule probably would prohibit Congress from doing most of what worries modern separationists. For example, it clearly would prohibit the government from prescribing school prayers for children, even supposedly voluntary prayers. A moment of silence would be all right, and probably a good idea. However, it would be impossible to write an official prayer today without offending some religious people. People from one religion would be offended by prayers chosen from another, devout people from most faiths would be offended by lowest common denominator pablum, and followers of certain Oriental religions that do not believe in a God to whom one prays would be offended by the implications of praying itself.

On the other hand, the establishment clause was not meant to prohibit truly nondiscriminatory forms of aid to religion. One such form of aid was adopted by the First Congress itself when it reenacted the Northwest Ordinance, which contained a clause giving free land to anyone who wanted to build churches or schools, including church schools, in the Northwest Territory. The land was available on a first-come, first-served basis. I would maintain that today's tuition tax credits or tuition vouchers are nondiscriminatory forms of aid not far different from the Northwest Ordinance. Tax credits and vouchers obviously raise different issues of public policy. Tax credits are easier to administer, but vouchers can be structured to give the public school system positive incentives to improve itself. Constitutionally, however, they are the same. They provide aid to parents without discriminating between secular and religious schools, let alone among religious sects.

While the issues seem clear under the original meaning of the First Amendment, they have been made less clear by the Supreme Court's reinterpretation of the religion clauses since 1947. It can almost be said of the modern court, as Karl Marx once said of the relationship between his own thoughts and Hegel's, that the Court has stood the First Amendment on its head. On the one hand, the Court correctly perceives that the framers wanted to encourage religion. But the Court has used the free exercise clause to grant religion special favors the framers never thought were required, while at the same time prohibiting the nondiscriminatory assistance the framers would have permitted. On the other hand, the Court also correctly sees that the Constitution is at its core a secular document. But the Court implements this perception through its reading of the establishment clause, while not permitting a religiously neutral application of civil law under the free exercise clause. The Court thus has created religious rights where none had existed, permitting religious opinion to stand as judge of the civil realm, while preventing the civil realm from helping religion on civil society's terms.

Lost somewhere in the theoretical murkiness of the Court's position is any indication of an awareness of the way the Founding Fathers meant the Declaration, Constitution and Bill of Rights to promote both religious health and civil peace. Unfortunately, some of the Court's modern conservative critics seem equally unaware of the deepest purposes of the nation's founding documents. By trying to push prayer on a nation whose religions are far more diverse now than they were a century ago, these people threaten to excite exactly the same passions the Constitution was meant to damp down. Both sides would do well to give more careful study to the foundations of the constitutional democracy they are so busily trying to alter.

RELIGION AND POLITICS

The Intentions of the Authors of the First Amendment

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PREFACE

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

What precisely do these sixteen words from the First Amendment to the U.S. Constitution prevent Congress from doing? The Supreme Court has held since 1947 that the establishment clause requires both Congress and the states to maintain strict neutrality between religion and irreligion in any laws that might conceivably aid private religious organizations. Legal disputes since then have had to do with the differences between "aid" to religion (prohibited by the Court), neutrality (required), and hostility (supposedly prohibited). Free exercise legal doctrine, in contrast, has been anything but neutral. The Supreme Court has said since 1961 that people with religious objections to valid secular statutes may, under certain circumstances, have a right to be exempted from the statute's requirements.

As the Court has espoused its doctrines, it has relied on an incredibly flawed reading of the intentions of the authors of the First Amendment. Unfortunately, most scholarly writings on the subject are little better.[1] Some are good on isolated points, but rarely has one tried to explain the complexities of the establishment issue or the relationship between establishment and free exercise.[2]

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[1] There is one noteworthy exception: Walter Berns, *The First Amendment and the Future of American Democracy* (New York: Basic Books, 1976), pp. 1-32. Berns's conclusions and mine are similar, although the evidence we use is different. This monograph is based on a Ph.D. dissertation Berns supervised: M. Malbin, *The Supreme Court and the Definition of Religion* (Cornell University, 1973). I should like here to express my thanks to him for his help and advice. Thanks also to Ann Diamond for her helpful comments.

The late Herbert J. Storing also read an early version of this work and made what for him were his normal quota of penetrating, insightful observations. I took Professor Storing's course on the American Founding at the University of Chicago in 1964. It was my first course in graduate school, but I can honestly say that none after that influenced my understanding of U.S. politics as deeply. I was one student in a fairly large class, and I transferred schools before reaching the dissertation stage. Yet, Professor Storing always managed to find the time to read my manuscripts or answer my questions, as he did with scores of others across the country.

This monograph attempts to correct that deficiency. It argues that the debates in the First Congress suggest that Congress did not mean the establishment clause to require strict neutrality between religion and irreligion. Aid to religion was to be permitted as long as it furthered a purpose the federal government legitimately could pursue and as long as it did not discriminate in favor of some sects or against others.

Federal aid to private schools would thus have been allowed under the original meaning of the establishment clause. Indeed, aid could even have been limited to religious schools, if Congress had a valid secular reason for doing so and if it could somehow manage to define "religion" in a way that did not exclude minor religions. However, these obstacles to limiting aid to religious schools would be substantial, perhaps insurmountable, in our modern, pluralistic nation, with its vast multiplicity of sects. The original purposes of the establishment clause applied today might well require government aid to include some or all secular schools, as well as the religious schools. Similarly, the original rule of law, applied today, would probably be inconsistent with such traditional practices as school prayers. Thus, a fully enforced requirement of nondiscrimination might not change many of the Supreme Court's specific holdings of recent decades. A return to the original conception, however, would surely alter the basic view of the relationship between religion and government in a way that would affect future legislation and future court cases.

A return to the original understanding of free exercise would work a similarly fundamental change in the way judges view court cases without compelling a reversal of many recent holdings. While there is less direct documentary evidence on free exercise than on establishment, the framers unquestionably denied that anyone had a *right* to claim an exemption from a valid, secularly based law because of a religious objection to it. Legislatures were encouraged to grant exemptions, but they were not required to do so. Precisely what was meant when the people were granted the right to exercise their religion freely needs detailed exploration. It is clear, however, that it did not mean what modern judges claim.

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[2] The two works which best seem to recognize the complexities of the historical establishment clause are Mark DeWolfe Howe, *The Garden and the Wilderness* (Chicago: University of Chicago Press, 1965) and David Lowenthal, "The Place of Religion in American Public Life: A Critique of Absolute Separationism" (Unpublished, 1969). The best known attempt to treat the two clauses as a unit is Phillip Kurland, *Religion and the Law* (Chicago: Aldine Publishing Co., 1962), which does not claim to be an interpretation of the work of the First Congress. Neither do the articles that deal with both clauses, such as Marc Galanter, "Religious Freedoms in the United States—A Turning Point?" 1966 *Wisc L Rev* 217; Donald A. Gianella's two-part "Religious Liberty, Nonestablishment and Doctrinal Development," 80 *Harvard L Rev* 1381 (1967) and 81 *Harvard L Rev* 513 (1968); and Paul G. Kauper, "*Schempp* and *Sherbert*: Studies in Neutrality and Accommodation," 1963, *Religion and the Public Order* 3.

1

The Establishment Clause

A great deal has been written about the original meaning of the establishment of religion clause, much more than has been written about free exercise. But for all of this writing, nobody has tried to interpret the debates in the First Congress on a speech-by-speech basis.

One reason for this reluctance to look into the legislative history has to do with the sources available to the scholar. It always has been known that the *Annals of Congress,* by far the most complete records of the debate available, is taken from the shorthand notes of a reporter, Thomas Lloyd, who compiled them for private sale. Because there were no verbatim or official notes of those early congressional debates, most historians have been reluctant to lean too heavily on them for their interpretations.

Recent archival work has made it possible for the student of the religion clauses to use the *Annals* with much greater confidence than might have been felt in the past. The First Congress Project at George Washington University, sponsored by the National Archives, has been collecting a massive amount of material in preparation for what it expects to be the definitive multivolume documentary history of the First Congress.[1] While the same cannot be said for all of the clauses in the Bill of Rights, nothing collected by the First Congress Project suggests any reason for dissatisfaction with the *Annals* on the religion clauses. Lloyd may not have recorded every word of every speech, but at no point do the other accounts of the debates add new information to the *Annals* or alter what was in them.

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[1] The project director is Professor Linda Grant DePauw. The first of a projected seventeen volumes was: *Documentary History of the First Federal Congress of the United States of America, Vol. 1: Senate Legislative Journal* (Baltimore and London: Johns Hopkins University Press, 1972). I should like to thank the project's two assistant editors, Charlene B. Bickford and Lavonne M. Hoffman, for their assistance.

Lloyd's notes tell us that the members of the First Congress did not intend the establishment clause to mean anything remotely resembling what the Supreme Court has been saying it means, at least since 1947. Some of the justices in recent years appear to have recognized that the Court's rulings have not been based on a proper reading of 1789 history.[2] But the justices have not replaced the earlier misreadings of history with an alternative interpretation. Instead, they have been acting almost as if their recognition of their predecessors' historical errors have liberated them from the need to consider what purposes the members of the First Congress may have meant the religion clauses to serve.

The turning point in the recent history of the establishment clause was the 1947 parochial school busing case of *Everson* v. *Board of Education*.[3] In the opinion written for the Court by Hugo Black, the Court announced a rule of law, endorsed by dissenters as well as by the five-justice majority:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.[4]

There were two key elements in this rule. (1) The Court said that Congress cannot give nondiscriminatory aid to religion. There never was any question that the clause prohibited Congress from preferring one religion or group of religions over another, but this was the first time the Supreme Court took the additional step of prohibiting nonpreferential aid to religion as such. (2) The other key element in the *Everson* rule was its effect on the states. For the first time, the Court said that whatever Congress could not do, the states could not do either.

The *Everson* Court claimed that it based its reading of the establishment clause on the intentions of the people in the First Congress.[5] Later, the Court led by Chief Justice Earl Warren reiterated this historical assertion in opinions endorsing the *Everson* rule.[6] While a number of legal scholars have supported *Everson's* reading of history,[7] the reading has not gone unchallenged. An impressive number of scholars has written in opposition to either the no-aid rule[8] or the extension of the establishment clause to the states,[9] but none has tried to interpret Lloyd's notes on a speech-by-speech basis. When we look at these notes carefully, we find that not one, but both, halves of the *Everson* rule fly in the face of the intended meaning of the establishment clause.

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[2] See, for example, Walz v. Tax Commission of the City of New York, 397 U.S. 664, 668, 90 S. Ct. 1409, 25 L.ed.2d 697 (1970), where Chief Justice Burger refers favorably to C. J. Antieau, A. T. Downey, and E. G. Roberts, *Freedom from Federal Establishment: Formation and History of the First Amendment Religion Clauses* (Milwaukee: Bruce, 1964), p. 6, note 9, without adopting their affirmative thesis.

[3] 330 U.S. 1, 67 S. Ct. 504, 91 L.ed. 711 (1947).

[4] 330 U.S. 1, 15.

[5] 330 U.S. 1, 13.

[6] McGowan v. Maryland, 366 U.S. 420, 440-41, 81 S. Ct. 1101, 6 L.ed.2d 393 (1961); Engel v. Vitale, 370 U.S. 421, 425, 82 S. Ct. 1261, 8 L.ed.2d 601 (1962); Abington School District v. Schempp, 374 U.S. 203, 213-14, 83 S. Ct. 1560, 10 L.ed.2d 844 (1963).

Amendments Proposed

The Constitution, as ratified, mentioned religion only once—in the Article VI clause prohibiting religious tests for national office. The delegates at the Philadelphia Convention thought that, since they were creating a government of limited powers, with no authority to act in matters relating to religion, no further protection was necessary. An extended, commercial republic, made up of people of all faiths, would never let the government impose a religious orthodoxy, as long as all kinds of people could be represented in the legislature.

This argument was not enough to satisfy many of those attending state ratifying conventions. Many of them were concerned that the federal government, using its constitutionally delegated powers, might pass laws indirectly affecting religion or other subjects previously reserved for the states. As a result, many of these ratifying conventions urged the national government to amend the Constitution as soon after ratification as possible. A few states specifically urged the inclusion of a bill of rights. Virginia and North Carolina proposed identical provisions dealing with religion:

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[7] Robert G. Dixon, "Religion, Schools and the Open Society," 13 *Journal of Public Law* 267, 278 (1964); Leonard Levy, *Judgments: Essays on American Constitutional History* (New York: Quadrangle, 1972) and "School Prayers and the Founding Fathers," *Commentary*, vol. 34 (September 1962), p. 225; Leo Pfeffer, "The Case for Separation," in J. Cogley, ed., *Religion in America: Original Essays on Religion in a Free Society* (New York: Meridian, 1968), pp. 57-73.

[8] Antieau, Downey, and Roberts, *Freedom from Federal Establishment;* Edward S. Corwin, "The Supreme Court as a National School Board," 14 *Law and Contemporary Problems* 3 (1949); Lowenthal, "The Place of Religion in American Public Life: A Critique of Absolute Separatism" (Unpublished, 1969); Edward R. Norman, *The Conscience of State in North America* (London: Cambridge University Press, 1964); James M. O'Neill, *Religion and Education Under the Constitution* (New York: Harper, 1949); Charles E. Rice, *The Supreme Court and Public Prayer* (New York: Fordham, 1964).

[9] Mark DeWolfe Howe, *The Garden and the Wilderness* (Chicago: University of Chicago Press, 1965), pp. 22-23; Wilbur Katz, *Religion and the American Constitutions* (Evanston, Ill.: Northwestern University Press, 1964) and "The Case for Religious Liberty," in Cogley, ed., *Religion in America*, p. 101; Lowenthal, "The Place of Religion," p. 19; O'Neill, *Religion and Education*, p. 10; Joseph Snee, "Religious Disestablishment and the Fourteenth Amendment," 1954 *Washington University Law Quarterly* 371.

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force and violence; and therefore all men have an equal, natural and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by law in preference to others.[10]

New York offered a provision similar to these,[11] while New Hampshire suggested that "Congress shall make no laws touching religion or to infringe the rights of conscience."[12]

When James Madison reworked the many amendments suggested by the states into one set of proposals to be presented to the First Congress, he revised this religion amendment and added a new one not suggested by the states that would have limited state power. The two amendments were introduced by Madison to Congress on June 7, 1789.

> The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed.[13]

> No state shall violate the equal rights of conscience or the freedom of the press, or the trial by jury in criminal cases.[14]

The language used in these amendments indicates that Madison wanted to prohibit both the states and the federal government from infringing on the rights of conscience. In contrast, the establishment clause was to apply only to the federal government.

Madison's proposed amendments were referred on June 7 to the Committee of the Whole House.[15] After they sat idle for a month and a half, they were referred on July 21 to a specially formed Select Committee, of which Madison was a member.[16]

The Select Committee acted fairly quickly, reporting to the House after one week, on July 28. The committee recommended the proposal to prohibit the states from violating the equal rights of conscience, and the House passed it after little debate and only a minor modification.[17] It also recommended an amended version of the proposal limiting congressional action, but, in contrast with the limitation on state action, this proposal was debated by the First Congress at greater length than almost any other item in the Bill of Rights.

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[10] J. Elliot, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 2d ed., 5 vols. (Washington, D.C., 1836), vol. 3, p. 659 (Virginia) and vol. 4, p. 1244 (North Carolina).

[11] Ibid., vol. 1, p. 328.

[12] Ibid., vol. 1, p. 362.

[13] 1 *Annals of Congress* 434 (June 8, 1789).

[14] Ibid., p. 435.

[15] Ibid., p. 450.

[16] Ibid., p. 665.

The committee version of the limitation on congressional action, which was to be changed several times during the course of the debates over the Bill of Rights, read:

> No religion shall be established by law, nor shall the equal rights of conscience be infringed.[18]

This committee version made two major changes from the original Madison proposal. First, the committee dropped the phrase "the Civil Rights of none shall be abridged on account of religious belief or worship." Since there was no committee report, any explanation of the meaning of this change must be conjectural. One plausible reason for the omission is that the phrase seems to be redundant, protecting nothing not covered either by Article VI of the original Constitution or by the other clauses of the proposed amendment.

The second committee change was the omission of the word "national" used in Madison's proposal, making the amendment read, "No religion shall be established by law." This change was more significant than the other one, but it would be best to defer an explanation of its meaning until the debate is analyzed.

Another two weeks passed between the July 28 filing of the Special Committee's report and the consideration of the Bill of Rights on the floor. In other words, more than two months elapsed between Madison's June 7 introduction of the amendments and the start of floor debate on August 15.

This waiting period may seem normal to a student of the modern Congress, who is used to seeing bills become lost in standing committees. But it was exceptional in the early Congresses, and, as the months wore on, the time element became an important factor in the political strategies of those interested in the amendments.

Anti-Federalists who had opposed the Constitution had used the lack of a bill of rights as an argument against ratification. Now, these same anti-Federalists hoped to stall the Bill of Rights and thus weaken support for the new Constitution. The tactic might have succeeded. There was a delay in assembling a quorum at the beginning of the First Congress and time was short.

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[17] The House's rewording involved only a minor shift in grammar. 1 *Annals* 755.

[18] 1 *Annals* 729.

Madison understood this tactic for what it was.[19] Once the amendments reached the floor, he acted forcefully to expedite debate and to arrange the compromises necessary to assure passage before adjournment.[20] Readers looking at the *Annals of Congress* for the first time have to bear this in mind as they read the Bill of Rights debate. Much of the character of the debate, as well as some specific features of the compromises made, derive directly from the tactical situation created by this time pressure.

The August 15 Debate

Debate on the Bill of Rights opened in the House on August 15, when the religion amendment received its principal consideration. The debate left many questions unanswered—one day was hardly sufficient for a matter as complex as religious disestablishment and toleration. But one day was more than the Congress spent on most other items in the Bill of Rights. After the pressure of time had become more obvious, the members accepted some of the clauses, including the free exercise clause, with little or no debate.

The August 15 speeches concentrated on the establishment question, bypassing the "rights of conscience" or "free exercise" clause almost completely.[21] Peter Sylvester, a fifty-year-old lawyer from New York who served on the Committee of Safety in 1774, opened the debate.

Sylvester's speech indicated that he was unhappy with the language in the Select Committee's version of the establishment clause. His objection, he said, was that the particular words used could lend themselves to an unintended construction. In particular, he feared that the clause "might be thought to have a tendency to abolish religion altogether."[22]

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[19] James Madison, *The Writings of James Madison*, Gaillard Hunt, ed., 9 vols. (New York: Putnam, 1900-1910), vol. 5, p. 335.

[20] See, for example, Madison to Edmund Randolph, August 21, 1789, ibid., vol. 5, pp. 417-18. A similar point about the delaying tactics of the opposition was made in a letter from John Brown to William Irvine, August 17, 1789. The letter is held in the Caryl Roberts Collection of the Irvine Papers, Historical Society of Pennsylvania. Brown wrote, "the Antis, viz, Gerry, Tucker, etc., appear determined to obstruct and embarass the business as much as possible." A similar picture of Gerry and Tucker's motives appears in a letter dated August 18, 1789, from Frederick A. Muehlenberg to Benjamin A. Rush. Copies of both letters are available in the files of the First Congress Project.

[21] The entire debate may be found at 1 *Annals* 729-31, and is reproduced in Stokes, *Church and State*, vol. 1, pp. 541-43. Unfortunately, there seems to be some variation in the pagination of different prints of the *Annals*. In a footnote, Stokes refers to this debate as occurring on pp. 757-59, and this author has seen other numberings as well. The numbers given here seem to be the most common. Any researcher having trouble using the *Annals*, however, would be best advised to rely on dates rather than page numbers.

Sylvester's objection seems a strange one. Readers trying to make sense of the debates have to ask themselves how anyone ever could think that an amendment reading "no religion shall be established by law" could be dangerous for religion. Unfortunately, Sylvester never explained his reasons.

What seems likely is that Sylvester had two premises in mind as he spoke: (1) He probably was concerned that the phrase "no religion should be established by law" could be read as a prohibition of all direct or indirect governmental assistance to religion, including land grants to church schools, such as those contained in the Northwest Ordinance, or religious tax exemptions. (2) Sylvester apparently thought some form of governmental assistance to religion was essential to religion's survival. Unless these premises are assumed, it is difficult to see how Sylvester could have seen the establishment clause as a threat to religion.

This reading of Sylvester's statement obviously supports this author's view of the historical meaning of the establishment clause. But as convenient as it is, it involves too many assumptions to be accepted without corroboration. It is necessary, therefore, to continue reading beyond the debate's first speech.

As we continue reading, however, we discover rapidly that something said by the Massachusetts anti-Federalist leader Elbridge Gerry supports this interpretation of Sylvester's remarks. Gerry spoke after Select Committee Chairman John Vining, of Delaware, who would have reversed the order of the "rights of conscience" and "establishment" clauses as a way of showing concern for the continued existence of religion. Gerry urged the Congress to reword the amendment to read "no religious doctrine shall be established by law."[23] The effect of this would have been to prohibit the most serious form of religious establishment, the proclamation of an official credo, without prohibiting all things that might conceivably be regarded as "aids" to religion.

What did Gerry's proposal have to do with the two speeches preceding his? Gerry apparently was responding to something, rather than starting the debate anew. Gerry may have been dissatisfied with Vining's response to Sylvester's criticism of the clause. Since Gerry's alternative language would have allowed some assistance to religion, that seems to confirm our earlier reading of Sylvester.

Roger Sherman, of Connecticut, was the fourth speaker whose remarks were recorded by Lloyd. Sherman reiterated the Federalist delegated-powers argument against having any bill of rights. Sherman said that he saw no need for an amendment, since the government had no authority to pass legislation dealing with religion. Daniel Carroll, the fifth speaker, disagreed with Sherman, not because of his understanding of the powers delegated to the federal government, but because of the need for conciliating the anti-Federalists, who wanted amendments to quiet their fears about the new government's powers.

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[22] 1 *Annals* 729.

[23] Ibid., p. 730.

The next speaker was James Madison. Lloyd's summary of his speech reads:

> Mr. MADISON said, he apprehended the meaning of the words to be, that Congress should not establish *a* religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the constitution, and the laws under it, enabled them to make laws of such a nature as might infringe the rights of conscience and establish *a* national religion.[24]

Madison's response to Sherman in this speech is obvious and on the surface: whether the amendment really was needed or not—he privately agreed that it was not—some states wanted it. But there is another interesting aspect of this speech. In two places Madison misquoted his own proposal, adding a word to it by saying that Congress should not establish *a* religion. The additional word is significant. If it had been in the original, Sylvester would never have objected. If the added word had been in Madison's clause, it could not have been read as a prohibition of indirect, nondiscriminatory assistance to religion. To say that Congress should not establish *a* religion differs from saying it should not assist religion as such.

Benjamin Huntington, speaking after Madison, returned to this problem of the difference between the clause's language and the intentions of the members of Congress. Huntington said that he agreed with Madison about what people wanted the amendment to say. In a phrase similar to Sylvester's, however, he expressed concern "that the words might be taken in such latitude as to be extremely hurtful to the cause of religion," and he "hoped, therefore, the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all."[25] That is to say, Huntington thought the amendment should not require the government to be neutral to all differences between religion and irreligion.

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[24] Ibid. [Emphasis added.]

Madison responded by suggesting that if the word "national" were added before the word "religion"—which would return the clause to the language he presented on June 28—the questions raised by both Sylvester and Huntington would be answered. He then indicated clearly that he accepted the Sylvester-Huntington view of what the clause should be saying, by stating its most important purpose in this way:

> Madison believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought that if the word national was introduced, it would point the amendment directly to the object it was intended to prevent.[26]

Up to this point in the debate, everyone seemed agreed on what they wanted the amendment to say. The major disagreement was over the language reported by the committee, and whether it could be misconstrued to mean something other than what was intended. All of the speakers, except Sherman, agreed that the Bill of Rights should prohibit the new government from establishing a national religion. In addition, they did not want the government to have the power deliberately to favor one religion over another. But every one of them also seemed to agree that the Bill of Rights should not prevent the federal government from giving nondiscriminatory assistance to religion, as long as the assistance is incidental to the performance of a power delegated to the government. Both Sylvester and Huntington thought that the failure to extend this kind of assistance would be the equivalent of active hostility to religion. Madison, even though he privately questioned the efficacy of governmental assistance to religion, accepted the Sylvester-Huntington view throughout the First Congress debates.

A new element was added to the debate immediately after Madison's speech urging the addition of the word "national." Samuel Livermore, of New Hampshire, objected to the rewording and offered in its place the language proposed by the New Hampshire ratifying convention: "Congress shall make no laws *touching* religion, or infringing the rights of conscience."[27] This was the first statement in the debates which, if taken out of context, could conceivably be used to support the modern Supreme Court's "no aid to religion" interpretation of the establishment clause. But Livermore's silence on the agreement between Sylvester, Huntington, and Madison on indirect nondiscriminatory assistance suggests that what he wanted had little to do with the aid/no aid issue. This is confirmed by the character of the arguments used by Elbridge Gerry to support Livermore.

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[25] Ibid., 730-31.

[26] Ibid., p. 731.

[27] Ibid. [Emphasis added.]

Gerry, speaking next, immediately connected Livermore's proposed language to Madison's use of the word "national." Gerry objected to Madison's choice of language because it implied that the Constitution created one nation, with a national government, instead of a union of states ruled by a federal government with limited powers. He principally was concerned, in other words, with the symbolic importance of putting the word "national" in our fundamental legal document, a word which the 1787 Convention carefully left out of the original Constitution when referring to the government of the United States. Gerry's concern with the relationship between the federal and state governments, expressed here during the establishment clause debate, was a consistent theme raised by Gerry during the First Congress, as it had been during the Constitutional Convention.

The Select Committee's version of the establishment clause—with its deletion of the word "national" from Madison's original proposal—would have satisfied this objection of Gerry's, but the committee version was too ambiguous on other grounds. Gerry supported Livermore because Livermore went even further than the committee did toward satisfying Gerry's concern over the nation/state issue. Livermore's suggested prohibition of any federal law "touching" religion differed in two ways from the versions of the clause discussed until then. (1) Livermore's language apparently would have prohibited any form of federal aid to religion, including nondiscriminatory aid offered to achieve a properly delegated end. However, this would not have led to the destruction of religion that Sylvester and Huntington feared, because Livermore's language reaffirmed the power of the states to aid religion as they saw fit. (2) Indeed, state power would have been enhanced. The Federalist interpretation of "necessary and proper" was consistent with permitting federal laws to affect state establishments indirectly, as long as Congress was trying to achieve something it had the power to accomplish. Livermore would have prevented this, and thereby could have raised havoc with the powers of the new federal government. It was precisely for this reason that Gerry, ever watchful of the new government's power, supported Livermore.

Livermore and Gerry had struck a responsive chord, and Madison knew it. He spoke right after Gerry to deny that his insertion of the word "national" was meant to have any symbolic importance, and he withdrew his motion to include the word. But the damage to the Federalist position had been done, at least for that day. The Select Committee's language, which had been neutral on the nation/state issue, was defeated 31-20 by the anti-Federalist Livermore proposal.

The August 20 Reconsideration

The August 15 debate was the only one recorded on either of the religion clauses. But the conclusion of public debate did not put an end to the changes the members of the First Congress made in the wording of the amendment.

On August 20, Fisher Ames, of Massachusetts, suggested that the establishment clause should be returned to the Select Committee's version. His proposal also marked the first congressional appearance of the free exercise clause as we know it.

> Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.[28]

If the interpretation given here of the Livermore amendment is correct, the Ames version of the establishment clause represented a return to a compromise position on the nation/state issue: while there were no claims that the United States was one "nation," neither were there any positive assurances that Congress would not do anything that touched the state religious establishments. This compromise, however, was not to be the last word on the nation/state issue.

Ames's addition of the free exercise clause obviously was important, but because the *Annals* do not report any speeches on the proposal, it is difficult to determine its meaning. What was the relationship between the "free exercise" and the "rights of conscience" clauses in Ames's proposal? Were they redundant? Was the phrase "free *exercise*" meant to suggest that something more than rights of conscience or belief were to be protected? If so, what did the word "exercise" mean? Since Madison did use the word "worship" in his first version of the religion clauses, did "exercise" refer to the utterance and expression of belief through worship? If so, was the idea of worship understood to be limited to traditional modes of public, congregational prayer, or were other forms of expressive activity and/or religiously motivated behavior to be protected as well? Without any legislative record it is impossible to answer these questions without referring to noncongressional contemporary sources. We shall turn to these later.

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[28] 1 *Annals* 766 (August 20, 1789).

Although there was no floor debate on Ames's motion, there must have been considerable discussion of it off stage before it was introduced. The House accepted the motion of August 21, with no apparent controversy or counterproposal. On August 24, after some minor stylistic revision, the House sent the Ames's version to the Senate as its final version of the religion amendment.[29]

Senate Action

The principal Senate debate on the amendment apparently took place on September 3. We have to say "apparently" because Senate floor debates during the early Congresses were kept secret.

The Ames amendment must have provoked controversy in the Senate, since several alternative versions were suggested in its place. The votes on these seem to have been close, because competing versions were passed and then defeated again in fairly rapid order. Unfortunately, the *Senate Journal* does not even give us vote divisions; all we are told is whether a given motion passed or was defeated.

The first substitute amendment to be offered in the Senate on September 3 read as follows:

> Congress shall make no law establishing one religious sect or society in preference to others, or to infringe on the rights of conscience.[30]

This version dropped the free exercise clause, while it made the establishment clause completely unambiguous on the permissibility of nondiscriminatory aid. It was defeated at first, but then was accepted by the Senate after reconsideration. But that did not end the matter. After the Senate rejected a motion offered on that same day to eliminate the religion amendment entirely, it then rejected two versions of the amendment that were similar to the one they had just accepted. The two defeated amendments read:

> Congress shall not make any law infringing the rights of conscience, or establishing any religious sect or society.[31]
>
> Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibit-

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[29] 1 *Annals* 779. For receipt by the Senate, see Journal of the First Session of the Senate, p. 60 (August 25, 1789). [Hereinafter cited as 1 S. Jour.]

[30] Ibid., p. 70.

[31] Ibid.

> ing the free exercise thereof, nor shall the rights of conscience be infringed.[32]

The parliamentary status of the version that had passed earlier in the day is left mysterious by the *Journal*. But whatever its status, the succession of amendments offered makes it clear that both the wording of the establishment clause and the very presence of the free exercise clause were being debated. The Senate ended the day by accepting most of the Ames version, after striking the seemingly redundant clause, "nor shall the equal rights of conscience be infringed." At the end of September 3, the Senate version of the amendment read:

> Congress shall make no law establishing religion, or prohibiting the free exercise thereof.[33]

This did not satisfy some senators, who wanted to spell out the particular relationships between government and religion that they considered to be establishments. On September 9, the Senate embodied these concerns in the narrowest version of the amendment we have seen so far:

> Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion.[34]

This was the religion amendment that the Senate sent back to the House.

The Meaning of the Final Language

The House refused to accept the Senate's changes in the Bill of Rights and asked for a conference.[35] The *Annals* do not give the House's reasons for rejecting the Senate's version of the religion amendment, but reasons come to mind readily. Madison's understanding of the kinds of governmental activities that should be prohibited was much broader than the understanding implied by the Senate amendment. At least part of Madison's broader conception was accepted by most members of the House.

The conference committee for the Bill of Rights was a strong one, composed of Representatives James Madison (Va.), Roger Sherman (Conn.), and John Vining (Del.), chairman of the House's Select Committee, and Senators Oliver Ellsworth (Conn.), Charles Carroll (Md.), and William Paterson (N.J.).[36] The House members seem to have had their way on the religion amendment. The version that came out of the conference was essentially the Ames version with one significant alteration:

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[32] Ibid.

[33] Ibid.

[34] Ibid., p. 77 (September 9, 1789). The Senate defeated the amendment that would have prohibited the states from infringing on the rights of conscience. Ibid., p. 72 (September 7, 1789).

[35] Ibid., pp. 77-78.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

The conference committee's language was accepted by the House on September 24,[37] and by the Senate on September 25.[38]

The final wording of the amendment embodied key compromises on both the nation/state and the aid/no aid issues, compromises which were made possible by the more important underlying agreement on the need to pass a bill of rights before time pressures made passage that year impossible. The most important compromise on the aid/no aid issue involved the use of the word "establishment" without such qualifying phrases as "religious doctrine" or "articles of faith." This formulation satisfied Madison's desire to prohibit indirect forms of discriminatory religious assistance as well as the direct establishment of a national church. At the same time, the phrase "an establishment" seems to ensure the legality of nondiscriminatory religious aid. Had the framers prohibited "*the* establishment of religion," which would have emphasized the generic word "religion," there might have been some reason for thinking they wanted to prohibit all official preferences of religion over irreligion. But by choosing "an establishment" over "the establishment," they were showing that they wanted to prohibit only those official activities that tended to promote the interests of one or another particular sect.

Thus, through the choice of "an" over "the," the conferees indicated their intent. The First Congress did not expect the Bill of Rights to be inconsistent with the Northwest Ordinance of 1787, which the Congress reenacted in 1789. One key clause in the Ordinance explained why Congress chose to set aside some of the federal lands in the territory for schools: "Religion, morality, and knowledge," the clause read, "being necessary to good government and the happiness of mankind, schools and the means of learning shall forever be encouraged."[39] This clause clearly implies that schools, which were to be built on federal lands with federal assistance, were expected to promote religion as well as morality. In fact, most schools at this time were church-run sectarian schools.

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[36] Stokes, *Church and State*, vol. 1, pp. 546-47.

[37] 1 *Annals* 913 (September 24, 1789).

[38] 1 S. Jour. 88 (September 25, 1789).

[39] 1 Stat. 50, 52 (1789), Art. III.

The conference committee's language indicates that, in addition to the problem of nondiscriminatory aid, committee members also were deeply concerned about the nation/state issue. This concern seems to have been reflected in the specific language they choose to insert, "no law *respecting* an establishment of religion."

Most commentators assume that the word "respecting" is synonymous with "tending toward." Thus, they read the clause as if it prohibits Congress from passing any law that tends to establish a religion. These commentators are only partly right. If this were all the conferees cared about, they could have handled the matter much more directly than they did. But what the conferees—or at least the House conferees—needed was language that would serve two purposes at once. To be sure, they wanted to prohibit laws that tended to establish a religion. But they also wanted language that would satisfy the nation/state concerns of such people as Elbridge Gerry and Samuel Livermore.

The language the conferees chose does serve both parts of this dual purpose. It not only prohibits laws which "tend to" establish a religion; it also prohibits Congress from passing laws "with respect to" an establishment of religion. In other words, it prohibits Congress from passing any law that would affect the religious establishments in the states.[40] This was designed to satisfy people from states, such as Massachusetts, that did have established churches. The conference committee's version did not go as far on this point as the proposal offered in the House by Livermore and Gerry on August 15, and that may help to explain why both men finally voted against the amendment when it was accepted by the House on September 24 by a vote of 35-14.[41] But the conference version was a compromise between the Ames version of August 20 and the more anti-Federalist Livermore version. Since the Ames version originally represented a compromise between the more nationalist Madison version and the Livermore proposal, the final version apparently went more than halfway in a vain effort to win the support of the anti-Federalists.

Most scholars who have written on the establishment clause fail to see this dual purpose because they underestimate the importance of the nation/state issue for the members of the First Congress. But, according to the only comprehensive study of that Congress written by a historian who used the First Congress Project's materials, federalism was *the* overriding issue throughout the Congress.[42] There should be no surprise, therefore, about its importance here.

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[40] Lowenthal noted the dual purpose of this language in "The Place of Religion," p. 19.

[41] 1 *Annals* 913 (September 24, 1789).

Thus, the records available to us demonstrate that the establishment clause was meant to have two major purposes:

(1) It prohibited the federal government from giving any aid to religion if the aid in question could *tend to* establish *a* religion. This prohibition was broader than either Gerry's "no religious doctrine" or the Senate's "no religious sect or society" formulas, but it was not so broad as to forbid such forms of nondiscriminatory assistance to religion as were found in the Northwest Ordinance.

(2) At the same time, the clause prohibited Congress from tampering with the state religious establishments. This prohibition was not so broad as it would have been under Livermore's proposal but it represented a more explicit guarantee to the states than anything in Madison's original package of amendments.

There remains one more difficult problem of interpretation. The legislative history of the establishment clause shows that the framers accepted nondiscriminatory aid to religion. Yet many writers, knowing Madison wanted to prohibit even this much, have used Madison's views stated elsewhere to support a strict separationist position. If these other writers are correct about Madison (and we know he did oppose Virginia tax benefits distributed to all churches), what can explain his willingness to go along with something different in the First Congress? The answer is twofold.

(1) He needed the votes to defeat Gerry's attempts during the summer of 1789 to delay the Bill of Rights, and he needed the Bill of Rights to achieve what was to him a more important goal than the exact wording of the establishment clause—public support for the new Constitution.

(2) Madison felt all along the First Amendment was unnecessary. He thought a modern extended republic would breed such a multiplicity of sects as to make establishment unlikely even without an amendment. Once amendment became politically desirable, he was willing to accept nondiscriminatory aid instead of strict separation. But the aid would be circumscribed very narrowly. It had to be given in pursuit of a legislative end specified in the Constitution, and it could not discriminate among sects. Together, these requirements would produce practical results only slightly different from the ones that would flow from his preferred notion of separation. All that would be needed was a strict enforcement of nondiscrimination. Even in Madison's day, nondiscrimination would have required one to consider Jefferson's margi-

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[42] Kenneth R. Bowling, *Politics in the First Congress, 1789-1791* (University of Wisconsin: Ph.D. diss., 1968).

nally Christian deism as a religion. Today, we also would have to include Muslims, Buddhists, and other sects outside the Judaeo-Christian tradition. Thus, the compromise he agreed to would have permitted aid to private schools but not any of the practices he thought dangerous.

What should be emphasized here is the broad area of agreement between Madison and the others in the First Congress. They all wanted religion to flourish; but they all wanted a secular government. They all thought a multiplicity of sects would help prevent domination by any one sect. All of them also thought religion was useful, perhaps even necessary, for teaching morality. They all thought a free republic needed citizens who had a moral education. They all thought the primary responsibility for this education lay with the states. And they all agreed that Article I gave Congress no direct power to to deal with the subject. The disagreement was over what Congress should be allowed to do pursuant to some other delegated power. Sylvester and those who agreed with him feared that religion would be hurt if Congress were not allowed to prefer religion over irreligion in otherwise valid laws. Madison, in forums outside the First Congress, thought religion would flourish best if it were left alone, in a strict policy of separation. But he saw no harm in compromising with Sylvester, so he did.[43]

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[43] These strands have been overlooked in the current debate over establishment for reasons largely having to do with the federalism issue. Some current writers believe the Civil War and Fourteenth Amendment so transformed the nation/state issue as to make readings based on 1789 desires to accommodate the anti-Federalists irrelevant. There are two answers to this.

(1) Before one assumes that the Fourteenth Amendment prohibits any state aid to religious organizations, one should be aware that the generation that adopted it thought yet another amendment (the "Blaine Amendment") would have been needed to achieve this. The amendment was passed by the House on August 4, 1876, but fell short of the necessary two-thirds in the Senate. The version introduced in the Senate on August 14, 1876 said, in part: "No state shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust under any State. . . . No . . . appropriation or loan of credit shall be made to any religious or anti-religious sect. . . . This article shall not be construed to prohibit the reading of the bible in any school or institution; and it shall not have the effect to impair the rights of property already vested." C. Moehlman, *The American Constitutions and Religion, Religious References in the Charters of the Thirteen Colonies and the Constitutions of the Forty-Eight States: A Sourcebook on Church and State in the United States* (Berne, Ind., 1938), p. 17.

(2) More important, suppose one adopts the post-1937 notion (in Palko v. Connecticut 302 U.S. 319, 58 S. Ct. 149, 82 L.ed. 288) that the concept of "ordered liberty" in the due process clause now requires the states to adhere to the establishment clause? Even so, one should not ignore the federalism portion of the original establishment clause, as the *Everson* Court did in 1947. Ignoring it affects the way one looks on the controversy over nondiscriminatory aid. If one tries to read the language in the establishment clause without its federalism context, a "no-aid" reading comes almost naturally. Understanding the federalism background helps clarify why the framers used the strange wording they did in a clause meant to permit nondiscriminatory aid.

2

The Free Exercise Clause

The meaning of the free exercise clause is still unclear. After reading the congressional debates, we can guess that its purpose may have had something to do with the relationship between conscientious belief and its expression, but we are not given enough material to be more precise than that. For this, we shall have to look at the contemporary historical record.

The Virginia Example

In recent decades, the Supreme Court has looked to the example of Virginia for an explanation of the meaning of religious freedom. Chief Justice Earl Warren's 1961 Opinion of the Court in *McGowan* v. *Maryland* was typical in this respect:

> This Court has considered the happenings surrounding the Virginia General Assembly's enactment of "An act for establishing religious freedom," . . . written by Thomas Jefferson and sponsored by James Madison, as best reflecting the long and intensive struggle for religious freedom in America, and as particularly relevant in the search for First Amendment meaning.[1]

It would be too simple, of course, to equate the proceedings leading to the Virginia Religious Freedom Act with those leading to the ratification of the First Amendment,[2] but these proceedings can be helpful in our attempt to understand the First Amendment. In contrast with the lack of debate on the free exercise in the First Congress, the 1785 Virginia religious freedom debate led the noted authority Anson Phelps Stokes to describe it as probably the most significant debate on the subject ever to have been held in any legislative body.[3] Furthermore, the Bill for Religious Freedom passed at the culmination of this debate was the most far-reaching piece of legislation ever passed on this subject up to the time of the First Congress.[4] No other state—indeed, no other country—went as far toward protecting religious freedom in law as did Virginia in 1785.

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[1] McGowan v. Maryland, 366 U.S. 420, 437, 81 S. Ct. 1101, 6 L.ed.2d 393 (1961).

[2] Several authors are critical of the Court's heavy reliance on the Virginia example, particularly with respect to the establishment clause. See C. J. Antieau, A. T. Downey, and E. C. Roberts, *Freedom from Federal Establishment: Formation and History of the First Amendment Religion Clauses* (Milwaukee: Bruce, 1964); Paul Kauper, *Religion and the Constitution* (Baton Rouge: Louisiana State University Press, 1964), p. 49; Ernest Brown,

What this means for our purposes, as we attempt to understand the meaning of free exercise in 1789, is that—unless someone discovers historical evidence to the contrary—we are justified in making one important assumption as we try to interpret 1789 intentions with 1785 evidence. Whatever Fisher Ames's precise intent may have been when he introduced the idea of free exercise, we may assume that the principles the representatives had in mind as they accepted Ames's language were not likely to have been more liberal than those of the most liberal of the Virginia religious freedom advocates. The phrase "free exercise" first appeared in the religion proposals made by the Virginia ratifying convention to the First Congress, and there is no evidence to suggest that the members of the Virginia legislature who made this proposal wanted the federal Constitution to give any more protection to religious activities than they gave under their own state laws.

The 1776 Virginia Declaration of Rights

The 1785 religious freedom bill did not arise *in vacuo,* of course. It was the end result of a decade-long struggle which began in 1776. The Virginia Constitutional Convention of May 1776 wrote a revolutionary constitution for the newly independent Commonwealth of Virginia containing a Declaration of Rights with a clause on religious liberty.[5]

"*Quis Custodiet Ipsos Custodes?*—The School Prayer Cases," 1963 *The Supreme Court Review* I, 7-9. I am less concerned with the fact that the Court relied on Virginia history, however, than with its interpretation of that history's meaning.

[3] Stokes, *Church and State,* vol. 1, p. 366.

[4] Ibid., vol. 1, p. 334.

[5] Hamilton J. Eckenrode wrote: "The religious struggle in Virginia, has been misunderstood because generally it has been considered by itself. . . . The controversy had a wider relation than to religion alone; it was a side of the Revolution." *Separation of Church and State in Virginia* (Richmond, 1910), p. 91. In addition, as we shall see, the victory of the Jeffersonian principles of religious liberty was but one facet of the political victory of the thought of John Locke in the United States.

The author of the clause was George Mason, one of the more experienced of the politicians who helped guide the declaration through the convention and one of the most forceful spokesmen for religious liberty in Virginia at that time. As originally proposed by Mason, the clause declared,

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, that all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate, unless under color of religion any man disturb the peace, the happiness, or safety of society, and that it is the mutual duty of all to practice Christian forbearance, love and charity toward each other.[6]

Two points about Mason's proposal should be noted. First, the phrase, "the duty which we owe to our Creator, and the manner of discharging it" defined religion as the belief in a Creator and *all* of the duties arising from that belief. The definition was an important one, because it was the one consistently used in all of the Virginia legislation of this period. It excluded atheists, but it included deists. The second point is that, even though the definition considered all actions flowing from the duties owed to a Creator to be religious actions, the declaration did not say that all such actions could be performed freely. No person was permitted to do anything, whether religiously motivated or not, which might "disturb the peace, the happiness, or safety of society."

Mason's proposal went further than anything ever before adopted in Virginia, but it did not go far enough to satisfy James Madison—then a twenty-six-year-old political scientist not long out of his studies in religion at Princeton. Madison particularly objected to Mason's use of the word "toleration" to describe civil society's acceptance of religious freedom, because the idea of toleration implied something which existed as a gift from the government, and not as a matter of right. He offered a substitute clause which provided,

> That religion, or the duty we owe our Creator, and the manner of discharging it, being under the direction of reason and conviction only, not of violence, or compulsion, *all men are entitled to the full and free exercise of it* according to the dictates of conscience; and therefore that no man or class of men ought on account of religion to be invested with particular emoluments or privileges, nor subjected to any penalties or disabilities, unless under color of religion the preservation of equal

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[6] G. Hunt, "Madison and Religious Liberty," *American Historical Association Annual Report* (1901), pp. 163, 166.

> liberty, and the existence of the State be manifestly endangered.[7]

Thus, Madison not only would have shifted away from the language of toleration to the language of rights, he also would have prohibited religious assessments and privileges, and, more important, he would have extended the protection of religious activity to include even those actions which disturb the "peace, happiness or safety" of society unless "the preservation of equal liberty and the existence of the State be *manifestly endangered*." This early version of the clear and present danger test went much further than Mason's proposal. The other delegates to the Virginia Convention would not accept it, however, and it was defeated, never to reappear in any proposal made in Virginia or elsewhere until the twentieth century.

The version finally adopted by the 1776 Convention contained Madison's "free exercise" language in place of Mason's phrase about toleration, and retained Mason's admonition to Christian forbearance, love, and charity. Neither Mason's nor Madison's version of the proper limit to place on legislative regulation of religious activity made its way into the final version: perhaps the legislature could not decide between the two texts. In its final form, then, the religious liberty guarantee of 1776 read as follows:

> That religion, or the duty we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity toward each other.[8]

Between 1776 and 1784

The issue of religious freedom came up a number of times in the Virginia legislature in the eight years between the year the Declaration of Rights was adopted, 1776, and the year the fight leading to the Bill for Establishing Religious Freedom began, 1784. In December 1776, the Legislature's Committee on Religion, chaired by Jefferson, reported two bills designed to repeal all of the penalties then placed on dissenters for expressing their religious opinions. Both bills were passed. Also in 1776, the official tithes collected to meet the salary payments of Anglican clergy were suspended for one year. While Jefferson could not find enough support for a complete abolition of the tithe in 1776, the Revolutionary War made it easy to continue the one-year suspensions of support for the Church of England until the tithe could be abolished in 1779. Dissenting (that is, non-Anglican) ministers were given the right to perform marriages in 1780, as long as they obtained a license, and in 1784 the license requirement was eliminated.[9]

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[7] Ibid., pp. 166-67. [Emphasis added.]

[8] Ibid., p. 167.

There seems to have been a temporary shift in direction by the end of 1784, as the supporters of establishment gained a majority in the Assembly. This was the result both of the war's end and of the sorry state of Episcopalianism since the end of the tithes.[10] The Act Incorporating the Episcopal Church was passed in December 1784. Far more important, however, was the General Assessment Bill of 1784, or the "Bill for Establishing Support for Teachers of the Christian Religion." This bill, designed to serve as a replacement for the tithe, would have (1) named Christianity as the Established Religion of the Commonwealth; (2) declared the Articles of Faith essential to Christianity; (3) defined the forms of congregation that constituted a Christian church; and (4) assessed each person a certain amount to be used to support the religious teacher and place of worship of his choice. If he should fail to name a choice, the amount was to be paid into a public fund to aid seminaries.[11]

General Assessment Bill of 1784

This General Assessment Bill passed its second reading in the Assembly by a vote of 44-42, on December 23, the day after the passage of the act incorporating the Episcopal church. Somehow, though, Madison was able to win a vote on the next day to postpone the third reading until the next session of the legislature, to be held at the end of 1785.[12]

By the time the legislature reconvened, the narrow majority in favor of assessment had been changed to a majority against. Several factors helped bring about this change. First, Patrick Henry was elected governor in November 1784, with Jeffersonian-Madisonian support. That was one month before the first votes on incorporation and assessment, and it removed the leading supporter of assessment from the Assembly. Henry was easily the most powerful figure in the Assembly, and his departure, combined with the absence of anyone with equal legislative skills to take his place, left Madison in a position to take advantage of a vacuum. The effect of Henry's absence was already felt in the erosion of the support for assessment in the month between November and December, when Madison won postponement of the third reading. It became critically important by the following year.

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[9] This material is summarized by Stokes, *Church and State*, vol. 1, p. 380 ff.

[10] Eckenrode, in *Separation*, pp. 73-75, noted that the Episcopal (Anglican) clergy had done so little to develop sources of voluntary contributions up to this time that, with the end of legally enforced tithes, a number of these clergy went without pay for years, while many others had to leave their churches. This and other factors led some supporters of the Revolution—including George Washington, John Marshall, and Patrick Henry—to express concern about the future ability of the churches to perform the function of inculcating morality in the citizens of the Commonwealth.

[11] An early version of this bill was published in Eckenrode, ibid., pp. 58-61.

[12] Ibid., pp. 102-103.

The second major factor in the defeat of assessment was the tactical error made by its supporters of bringing up the question of incorporating the Episcopal church before the assessment issue was settled.[13] The passage of the Incorporation Bill helped persuade a number of Presbyterians to join the strong Baptist opposition to assessment. During the recess, Presbyterians began to see the justice of the argument made by Madison and his supporters that the principle used to support a general assessment for all Christian sects could just as easily be used to support a special assessment for the benefit of one sect only. The Incorporation Bill, giving legally privileged status to the newly formed Episcopal church, led many Presbyterians to wonder whether the Episcopal church wanted to replace its forebear, the Anglican church, as *the* established church of the Commonwealth.[14] As a result, they formally came out in opposition to the bill during the summer of 1785, thus reversing their previous position.[15]

The final factor connected with the defeat of assessment was Madison's famous Memorial and Remonstrance of July 1785. The Memorial and Remonstrance was used as the basis for hundreds of petitions bearing thousands of names that were sent to the legislature in the fall. The petition campaign, organized by Madison's allies in the legislature, shook the belief of many statesmen that the general public favored assessment. Indeed, it gave the impression—valid or not—of overwhelming public opposition to the bill.[16]

When the Assembly reconvened in October 1785, the General Assessment Bill was permitted to die quietly in committee.[17] In its place, the Assembly passed the Bill for Establishing Religious Freedom on December 17.[18] (Jefferson had written this bill in 1779 while he was chairman of the Religion Committee, but it had remained dormant until Madison revived it while serving on that same committee in 1785.) The 1784 Act Incorporating the Episcopal Church was repealed the following year.[19]

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[13] Ibid., pp. 100-101.

[14] Ibid., pp. 80-81.

[15] Ibid., p. 106.

[16] For Madison's opinion of the tactical importance of the Memorial and Remonstrance, see J. Madison, "Detached Memoranda," *William and Mary Quarterly*, 3d Series, vol. 3 (1946), pp. 534, 555-56.

[17] Eckenrode, *Separation*, p. 113.

[18] Ibid., p. 114.

Madison on Religious Freedom

The opinions expressed by Madison in the Memorial and Remonstrance and by Jefferson in the Bill for Establishing Religious Freedom were, for our purposes, the most important of the views expressed during the ten years of Virginia debate. These two Virginia leaders were stronger advocates of the right of religious liberty than were any other major political leaders in the United States of the 1780s. As a result, what was said earlier about the way to use the example of Virginia in general applies with even more force to the historical relevance of Madison and Jefferson; whatever the general opinion on free exercise might have been in 1789 in the First Congress, the consensus surely did not go further than Jefferson or Madison would have gone in tolerating religious freedom.

Madison's views on religion during these years were stated most clearly in the Memorial and Remonstrance itself, and in the notes of a speech he made in the Assembly against the General Assessment Bill. In one of the important sections of this speech, Madison criticized the attempt of the General Assessment Bill to establish Christianity.[20] The principal objection was that the attempt to establish Christianity necessarily required someone to distinguish between what is Christian and what is not. The great danger in this was that, since definitions in this area are necessarily imprecise,[21] we may end up by branding those we call non-Christians as heretics. Once this happens the so-called heretics would have good reason to fear for their religious liberty.

Madison made a similar point in the Memorial and Remonstrance.[22] That work began with some general observations about religious liberty:

> We remonstrate against the said Bill, . . . because we hold it for a fundamental and undeniable truth, "that Religion or the

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[19] Ibid., pp. 116-29.

[20] James Madison, *Writings*, Hunt, ed., "Notes of Speech Against Assessments For Support of Religion," vol. 2 (November 1784), p. 89.

[21] In the long letter he wrote to Jefferson in 1787 describing the work of the Constitutional Convention, Madison commented that while "no distinction seems to be more obvious than that between spiritual and temporal matters," these lines become blurred upon closer inspection. October 24, 1787, ibid., vol. 5, p. 26.

[22] Ibid., vol. 2, p. 187.

> duty which we owe to our Creator and the Manner of discharging it, can be directed only by reason and conviction, not by force or violence." [Quoted from the 1776 Declaration of Rights.] The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to *exercise* it as these may dictate. This right is in its nature an unalienable right. It is unalienable; because the *opinions* of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men: It is unalienable also; because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such *homage,* and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society.[23]

Several points should be noticed about this passage. First, Madison accepted the definition of religion from the 1776 Declaration of Rights and, consequently, limited the discussion of religious liberty to a discussion of the claims against civil society which could be made by those who believe in the existence of a Creator. We noted earlier the dispute between Mason and Madison in 1776 over the extent to which civil society could legitimately regulate religiously motivated overt activity. The Memorial tried to split the difference between the two 1776 points of view. It began, as did Mason, with the statement of the primacy of opinion, but it went further. Madison argued that the natural right to hold opinions about the Creator implies a natural right to act on, or to exercise, those opinions. Madison did not go as far as he did in 1776, however, when he said that all action should be permitted unless it "manifestly endangered" the political community. In the Memorial, he seemed to limit the claims a believer could make against civil society to the performance of one particular kind of duty—the duty of paying homage to the Creator, that is, the duty of worship.

This view of the relationship between civil and religious obligation may seem straightforward at first glance, but it carried with it a number of difficult problems of interpretation. If worship is to be given some kind of special protection against legislative interference, it is necessary at some point to define the idea of "worship" and to state clearly the kind of protection it merits. Madison defined the idea in the quoted passage as the payment of homage to the Creator in a manner *the believer* thinks the Creator would find acceptable. In one respect, the subjective element of the definition is essential: Who but the believer himself is qualified to state the kind of worship demanded by the God in whom he believes? In another way, however, this element was precisely what created the difficulties: no political community can recognize a natural right to worship as one pleases, if worship is defined as whatever the believer thinks may be essential to pay homage to God. It is clear, for example, that sacrificial murder cannot be tolerated in the name of worship.

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[23] Ibid., pp. 184-85. [Emphasis added.]

Madison at no point indicated a way to resolve this problem. He apparently no longer thought that *all* forms of religious activity should be given special protection, but he indicated no satisfactory way of distinguishing worship from other forms of activity. In part, this imprecision may have stemmed from the fact that the Memorial was designed as a rhetorical argument against assessment, not one in favor of religious freedom. Unfortunately, because of a scarcity of sources, the speech against assessment and the Memorial are the best indications of Madison's thoughts on free exercise during this period. His views on establishment and on freedom of religious opinion are clear and well documented, but we are left in deep confusion on the meaning of the protection for religious activity.

Madison and Jefferson Compared

Jefferson's conception of religious freedom seems to have been more fully worked out than Madison's on this point and is more fully documented in readily accessible source material. Jefferson's Bill for Establishing Religious Freedom, for example, was much more explicit than the Memorial and Remonstrance in describing the kinds of religiously motivated behavior *not* protected by the idea of religious liberty. (In the quotation from the bill appearing below, the material in parentheses was in the bill as it was written by Jefferson in 1779 but was omitted from the version finally passed by the Assembly in 1785.)

> Well aware (that the opinions of men depend not on their own will, but follow involuntarily the evidence proposed to their minds;) that Almighty God hath created the mind free, . . . (that the opinions of men are not the object of civil government, nor under its jurisdiction;) that to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles, on supposition of their ill tendency is a dangerous fallacy which at once destroys all religious liberty . . .; *that it is time enough for the rightful purpose of civil government for its officers to interfere when principles break out into overt acts against peace and good order. . . .*
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> We, the General Assembly, do enact, That no man shall be compelled to frequent or support any religious worship,

> place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer, on account of his religious opinions or belief; but that all men shall be free to profess, and by agreement maintain, their *opinion* in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.[24]

This bill written by Jefferson and accepted by the Virginia General Assembly gave no protection to people who acted from religious motives if their actions, *in the judgment of government officials,* worked against peace and good order. Unlike Madison's Memorial and Remonstrance, the bill gave no explicit protection to worship except insofar as it was the expression of religious opinion. Under this formula, all sacramental activities were open to official scrutiny to see if they were consistent with peace and good order, and—again unlike the Memorial—the bill gave no weight to a religious interpretation of an action against an official interpretation of what the public order might require. Thus, Jefferson's formulation eliminated the ambiguity which resulted from Madison's attempt to protect worship while maintaining silence about other actions done in the name of religion.

This is about all we can learn from the 1785 bill itself. The bill differed from the Memorial and Remonstrance in important ways, but whether the differences between the views of their authors were seen by them as being serious ones is difficult to determine. Madison, after all, was the floor captain of Jefferson's bill in the Assembly. (Jefferson was in Paris.) Madison supported the bill's principles and was delighted by its success, but he probably would have wanted more had he had his first choice. The Memorial and Remonstrance represented a considerable step back from the "manifest danger" position of Madison in 1776. Nevertheless, the desire in 1784 to protect worship, as worship was defined by the believer, suggested that some of the premises underlying his thought might have differed from premises accepted by Mason, Jefferson, and most of the other supporters of religious freedom in Virginia at that time.

Whether Madison supported Jefferson's views fully or only partially, it is quite clear that the position adopted by the Virginia General Assembly in 1785 was Jefferson's. As a result, if we want to understand the meaning and purpose of the 1785 Virginia Bill on the critical question of the protection of religiously motivated behavior, we must turn primarily to the writings of Jefferson, not Madison. And if we want to understand Jefferson's thought, the best way to do so is to compare and contrast it with the thought of the writer who most directly influenced Jefferson's views on religious freedom, John Locke.

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[24] T. Jefferson, *The Complete Jefferson,* Saul Padover, ed. (New York: Duell, Sloan & Pierce, 1943), pp. 946-47; Stokes, *Church and State,* vol. 1, pp. 392-94. [Emphasis added.]

Jefferson and Locke

Much has been written about Locke's influence on Jefferson. The Declaration of Independence, for example, is well known to be based on the principles of Locke's *Second Treatise*. An article by S. Gerald Sandler[25] has proved beyond doubt that there was a similar connection between the Bill for Establishing Religious Freedom and Locke's *Letter Concerning Toleration*. Sandler arranged parallel passages from Locke's *Letter*, Jefferson's "Notes on Locke" (notes on the *Letter* compiled about 1775), and the Bill for Establishing Religious Freedom. These parallel passages, Sandler argued, show that Jefferson took material directly from Locke, transforming it into the ideas presented in the bill. Sandler found parallel passages in Locke and Jefferson's "Notes" dealing with at least these four of the principal lines of thought developed in the bill:

(1) True belief is inspired by reason, not force.

(2) Civil magistrates are not competent to judge matters of religious truth.

(3) The domains of church and state are separate, and, therefore, a citizen's (religious) opinions should have no effect on his civil capacities.

(4) Civil governments may punish sedition and other similar activities which represent the movement from opinion to overt activity against peace and good order.

Sandler's major point is incontrovertible: there were a number of key similarities between Locke's and Jefferson's thought. But there were important differences between them as well, and these are important to our understanding of what it was that the people of Virginia accepted. In order to explain both the similarities and the differences, therefore, as well as to provide a theoretical introduction for the presentation of Jefferson's thought, let us now look briefly at the *Letter Concerning Toleration*.

Locke on Toleration

Locke's *Letter* began by distinguishing between the proper business of civil government and religion.[26] The commonwealth, according to

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[25] S. Gerald Sandler, "Lockean Ideas in Jefferson's Bill for Establishing Religious Freedom," *Journal of the History of Ideas*, vol. 21 (1960), pp. 110-116.

[26] John Locke, *A Letter Concerning Toleration*, 2d ed. (New York and Indianapolis: Bobbs Merrill—Liberal Arts Press, 1955), pp. 17-23.

Locke, is a society of men who gather together to further their civil interests. These interests include "life, liberty, health and indolency of body; and the possession of outward things, such as money, lands, houses, furniture, and the like."[27] The duty of the civil magistrate is to secure these things for the people whom he serves; his jurisdiction cannot legitimately be extended to include the salvation of souls, because the purpose of politics is wholly concerned with the bodily needs—or "civil interests"—just described. A church, by way of contrast, is a free society whose major purpose involves the worship of God and the salvation of souls. Like the commonwealth, the church is a form of society, and as such it requires laws. But just as the commonwealth has no business making laws for the church, or legislating on the subject of salvation, neither should ecclesiastical discipline extend outside its own proper sphere. Thus, church law should not be concerned with civil and worldly goods, even if the church thinks there is a direct connection between worldly goods and eternal salvation. Similarly, the church should not use physical power to enforce its views on salvation; the use of physical power should be limited to the civil magistrate.[28] This "separation of church and state," based on a radical narrowing of the functions of both religion and politics, makes coexistence of church and state possible, but it is important to understand that this coexistence occurs largely on the state's terms: it is based on the view that the church should never interfere with the business of politics by compelling church members to accept the church's understanding of what is right and wrong with respect to the things of this world.

In return for telling the church to stay away from the business of the magistrate, Locke then told the magistrate not to interfere with what is left of the church's role. Since the function of politics leaves the magistrate with no legitimate reason for concerning himself with the salvation of souls, the magistrate therefore should not interfere with rites of worship—at least, not in the normal course of things. Locke avoided the difficulties Madison later faced with the idea of worship, however, by permitting the magistrate to prohibit from worship services whatever is normally prohibited to everybody. Thus, for example, ritual human sacrifice may be prohibited because all murder of humans is prohibited. On the other hand, the ritual sacrifice of calves must be permitted, as long as the animal slaughter corresponds to general health regulations concerning slaughter. The critical points here about the regulation of religiously motivated behavior are two:

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[27] Ibid., p. 17.

[28] Ibid., pp. 20-23.

(1) No magistrate may prohibit any activity merely because of an animosity toward the religious opinion reflected by that action. Actions must be judged in terms of their effect as actions, not in terms of the symbolic importance placed on them either by the believer or by the nonbelieving observers.

(2) This guaranty of nondiscrimination retained all important judgments in the hands of the civil magistrate. The magistrate could not discriminate against an action simply because it was motivated by a disliked religious opinion, but it was up to the civil authorities alone to judge the harmfulness or harmlessness of any particular activity.

What should a religious believer do, however, if the magistrate's judgment conflicts with his sense of religious obligation? What if, for example, the magistrate thinks that public health requires all butchering to be done in specified slaughterhouses, while the believer's religion requires him to sacrifice calves on an altar in his own house of worship? Or, what if the magistrate goes so far as to require the performance of an activity religiously prohibited, such as accepting a vaccination, saluting the flag, or participating in war? According to Locke, the first duty of a person placed in such a position is to follow his own conscience and save his immortal soul, but as a member of civil society he also has an obligation to obey the magistrate. Locke's solution to this conflict was interesting:

> What if the magistrate should enjoin anything by his authority that appears unlawful to the conscience of a private person? . . . Such a private person is to abstain from the action that he judges unlawful, and he is to undergo the punishment which it is not unlawful for him to bear. For the private judgment of any person concerning a law enacted in political matters, for the public good, does not take away the obligation of that law, nor deserve a dispensation.[29]

Thus, as long as the magistrate acts within his proper sphere of authority, the citizen with conscientious scruples should accept the punishment meted out to everyone for disobeying the law. It is important to note that the punishment is considered legitimate, since it does no harm to the natural rights of conscience. Perhaps even more important, as Locke indicated in a passage shortly after the one just quoted, was that the final judgment of the legitimacy of a magistrate's action was *not* left to the conscience of the troubled individual:

> What if the magistrate believes that he has a right to make such laws and that they are for the public good, and his subjects believe the contrary? Who shall be judge between them?

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[29] Ibid., p. 48.

> I answer, God alone. For there is no judge upon earth between the civil magistrate and the people.[30]

What did placing the final say in God's hands mean in political terms? It meant, quite simply, that the final determination on this earth was the magistrate's.

So far, this interpretation of Locke's *Letter* has concentrated on the conflicting obligations placed on a citizen's behavior by religion and politics. As such, the interpretation may have given the impression that Locke analyzed opinions in a radically different way from the way he analyzed overt actions. This impression is not accurate. According to Locke, even though the magistrate is not concerned with the state of human souls as such, some opinions are so intimately connected with behavior affecting life, liberty, and property that they do fall within the proper sphere of a magistrate's concern.

Locke divided all opinions, including religious ones, into two major categories in the *Letter*—speculative and practical. Speculative opinions were defined as those which terminated in the understanding, while practical ones were those which could influence will and behavior.[31] The magistrate should not concern himself with speculative opinions, Locke said, because these—by definition—have nothing to do with the business of the commonwealth. Practical opinions were another matter, however, since overt actions would affect life, liberty, or property. The magistrate may regulate obvious practical opinions about what is right and wrong in politics, since these clearly affect the goods of this world. In addition, Locke listed four kinds of religious opinion which normally might be considered speculative, but which have a sufficient influence on practical action to permit their regulation. These included: (1) opinions contrary to human society, or to those moral rules which are necessary to the preservation of civil society; (2) a belief that one's own sect may have special prerogatives; (3) a loyalty to a foreign prince (for example, the Pope); and (4) belief in atheism.

To summarize: Locke's *Letter* protected no opinion or action from the civil magistrate as a matter of right, if the opinion or action had an adverse effect on the proper concerns of civil society. As a matter of practicality, the magistrate must have discretion in determining what might have this kind of an adverse effect, and, as a result, a magistrate could, in theory, overstep his rightful authority. If he did, this was a matter for God to judge: on this earth, the final word short of rebellion in disputes between citizens and magistrates must lie with the magistrates.

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[30] Ibid., p. 49.

[31] Ibid., p. 45.

Locke and Jefferson on Religious Opinions

This analysis of Locke's *Letter* suggests that there were important differences between Locke and Jefferson. Jefferson, unlike Locke, placed great stress on the distinction between opinions and actions. The difference between the two writers on this point may not be as great as appears at first glance, as we shall see, but the emphasis Jefferson places on the protection of opinion was important nonetheless.

We have already looked at Jefferson's treatment of opinions and actions in the Bill for Establishing Religious Freedom. He also distinguished between opinion and action in the famous 1802 letter he wrote to the Danbury Baptist Association while he was President of the United States. Although the letter was brief (almost the whole of it appears below) there are indications that he meant the letter to be given serious attention.[32] The letter's key paragraph reads:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, *that the legislative powers of government reach actions only, and not opinions,* I contemplate with sovereign reverence that act of the whole American people which declared that this legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, *convinced he has no natural rights in opposition to his social duty.*[33]

Jefferson's well-known "wall of separation between church and State" was a barrier delineating the different functions of religion and politics. These different functions lead civil society to be concerned with overt actions only, not with mere opinions. The distinction between actions and opinions seemed clear and absolute, just as it did in the Bill for Establishing Religious Freedom. When we look more closely, however, at Jefferson's statement in his *Notes on Virginia* of the Lockean foundation for this wall of separation, we can see that the distinction between belief and action must be more equivocal than it appeared to be in the Danbury Baptist letter. The distinction between action and opinion was not self-explanatory, as it turns out, and Jefferson's toleration of expressions of dissenting religious opinion rested upon a more basic principle, as can be seen in the passage quoted below:

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[32] Jefferson gave a draft of the letter to Levi Lincoln, his attorney general, before sending it. See Leo Pfeffer, "The Case for Separation," in J. Cogley, ed., *Religion in America: Original Essays on Religion in a Free Society* (New York: Meridian, 1968), p. 74.

[33] T. Jefferson, "Letter to Messrs. Nehemiah Dodge, Ephraim Robbins and Stephen S. Nelson, A Committee of the Danbury Baptist Association in the State of Connecticut," January 1, 1802, in *Complete Jefferson,* pp. 518-19. [Emphasis added.]

> Our rulers can have no authority over such natural rights, only as we have submitted to them. The rights of conscience we have never submitted, we could not submit. We are answerable for them to our God. The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, *or no God*. It neither picks my pocket nor breaks my leg. If it be said his testimony cannot be relied on in courts of justice, reject it then, and let the stigma be on him.[34]

The major points of similarity between the Jefferson of this passage and Locke—the idea of natural rights, and the conception that the legitimate sphere of government extends only to injurious activity—are similarities which should be obvious to the reader and do not require further comment. Two important points do require amplification, however; Jefferson's views on atheists, and the status of harmful opinions.

A direct comparison of Jefferson's and Locke's views on how civil society should treat atheists points out one of the differences between them very clearly. Locke, we saw, thought that the acceptance of atheism would so undermine the bonds of civil society that the mere utterance of disbelief should occasion punishment. Jefferson did not disagree with Locke as to the utility of religion, but he did not consider the mere public expression of disbelief injurious to anything the government might legitimately protect. Further, the attempt to suppress the expression of atheistic beliefs would create an atmosphere injurious to the development of the true religion, which Jefferson thought to be a form of unitarianism.[35]

It is important to note, however, that Jefferson's reasons for extending the religious freedom guaranty to atheists[36] did not differ in any fundamental way from Locke's reasons for denying tolerance to atheists. The principle they both applied was, simply, that opinions about religion should be tolerated by the civil magistrate if—and only if—the opinions did not harm interests the government was supposed to protect. Jefferson thought that no expression of opinion about the existence of God could harm anyone else's life, liberty, or property, and for this reason he included atheist opinion within the spectrum of opinion protected. Locke, on the other hand, did not go this far, because he saw the open, public proclamation of atheist opinion as an immediate threat to civil society.

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[34] T. Jefferson, "Notes on Virginia, Query XVII: The different religions received into that state," *Complete Jefferson*, p. 675.

[35] For this point, as well as several others used in this section on Jefferson's view on atheism, see Jeffrey A. Burnam, *Religion and American Political Society: The Contemporary Supreme Court and the American Founding* (M.A. thesis, University of Chicago, 1964), pp. 62-69.

While the expression of disbelief in the existence of God should be tolerated, according to Jefferson, there were some opinions, which, by their very expression, *can* pick a man's pocket or break his leg. The expression of these opinions could be punished because picking a pocket or breaking a leg are overt acts within the sphere of legitimate governmental concern. Furthermore, even though the mere expression of disbelief in the existence of a God may not pick pockets or break legs, other opinions stemming from religious belief could conceivably have these effects. What determines whether the expression of these kinds of religious opinions—roughly analogous to Locke's "practical opinions"—should be punished is whether the magistrate decides that their mere expression constitutes overt acts against peace and good order.

For example, Jefferson was always willing to let the state governments punish seditious speech, and, in fact, his own two drafts of the Virginia Declaration of Rights carefully distinguished between religious opinion, which was to be protected, and seditious preaching, which was not.[37] Furthermore, we also know that he thought it possible to distinguish between religious and political utterances made from the pulpit,[38] and that he applied the same method of analysis to sermons about politics as to speeches of any other kind. In other words, to summarize Jefferson's views on this matter, Jefferson did distinguish between belief and action in many of his writings, but the *expression* of belief was considered to be an overt action, to be judged by its effect on civil society.

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[36] Ibid., p. 58. Burnam argued convincingly that Jefferson intended the Bill for Establishing Religious Freedom to protect atheist opinion. In his *Autobiography,* Jefferson wrote of the defeat of an amendment offered in the Assembly which would have limited the Religious Freedom Bill's protections to Christians. Jefferson stated that the defeat of the amendment meant that the Assembly accepted his intention to extend the protection to "Jews, Mohammedans, Hindoos and infidels." See *Complete Jefferson,* p. 1147. Burnam pointed out that Jefferson used the word "infidel" to cover a wide range of disbelief including, most significantly, the atheism of the French *philosophes.* For proof, he cited Jefferson's letter to John Adams of April 8, 1816 in *The Adams-Jefferson Letters,* Lester Cappon, ed., 2 vols. (Chapel Hill, N.C.: University of North Carolina Press, 1959), vol. 2, pp. 467-68.

[37] Leonard W. Levy, *Jefferson and Civil Liberties: The Darker Side* (Cambridge, Mass.: The Belknap Press, 1963), pp. 43-44, citing *The Papers of Thomas Jefferson,* Julian P. Boyd, ed., 17 vols. (Princeton, N.J.: Princeton University Press, 1950–), vol. 1, pp. 344, 353.

Free Exercise in the Bill of Rights

How can we translate all this material about Virginia practice into an understanding of the First Amendment's free exercise clause? We may accept as facts that Virginia gave more protection to religious freedom than was afforded anywhere else in the United States at the time, and that Jefferson's thoughts were the deepest and best expression of—if not the source of—the consensus of opinion reached in Virginia in the 1780s. Therefore, we may conclude that whatever protection the free exercise clause might have meant to give to religion, it was not likely to have been greater than the protection Jefferson thought religion should be given. We already have seen, however, that Jefferson would have given no more protection to religion than to atheism: harmless opinions were tolerated, while harmful opinions and actions were not.

If this is a correct interpretation of the history surrounding the free exercise clause, it seems to lead to a paradoxical conclusion. The religious freedom guaranty might have been important in Virginia as a protection for people branded as heretics, but, given the Jeffersonian interpretation of its meaning, the free exercise clause seems to add little not already present elsewhere in the Constitution: the speech clause of the First Amendment seems to protect opinions fully, while part of the idea of limited government, summarized in the Ninth and Tenth Amendments, is that even overt actions should not be regulated without cause.

This paradox forces us to conclude either that the free exercise clause simply was redundant, given the speech clause, or that it was not. If it was redundant, the major purpose of the clause would have to be understood to be rhetorical—an emphasizing of the special importance and delicacy of religious opinion within the whole spectrum of opinion protected by the speech clause. If the clause added something, however, it becomes necessary to consider what it might have added.

Two possibilities come to mind. One is that the speech clause may not have been understood as a protection for the expression of religious opinion. Alexander Meiklejohn argued forcefully that the primary function of the speech clause was to act as a protection for political speech.[39] If the authors of the First Amendment were concerned primarily with political speech, and if they therefore thought religious speech needed additional protection, then the main purpose of the free exercise clause might well have been to protect people who wanted to make religious speeches.

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[38] T. Jefferson, "No Politics In the Pulpit," (a letter written on March 3, 1815 to comment on the Rev. Alexander McCleod's book on the War of 1812), *Complete Jefferson*, pp. 953-54.

But that is a very modest definition of free exercise, and most people think it must mean something more; "exercise" they say, must have something to do with action. Now, it is quite clear that the clause was not intended to give the kind of broad, sweeping protection to religious activity that Madison envisioned in his "manifest danger" test of 1776. But could the clause at least have been intended to go part way toward protecting that special method of expressing opinion that is peculiar to religion, the worship service? The concern must have been for something more than religious assembly, since the First Amendment protects the right of assembly against federal interference just as it protects the right of speech. Madison had indicated in his 1784 Memorial and Remonstrance a desire to go beyond this to protect religious actions, but it is impossible from the historical record to know whether he persuaded any other members of Congress to enter this minefield of ambiguity with him.

One thing does emerge clearly from the record, however. At no time did anyone in Virginia other than Madison suggest that the overt activities of religious people should be judged by standards different from those used to judge the overt actions of irreligious people. Whatever a believer might think of the religious significance of a particular activity, it was the policy of Virginians to judge all actions, including those labeled by the believer as worship, by secular standards of harmfulness or harmlessness. There is no evidence to suggest that the First Congress adopted a different point of view.

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[39] A. Meiklejohn, *Political Freedom*, "Part I: Free Speech and its Relation to Self-Government" (New York: Harper, 1960), pp. 3-87.

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Conclusion

It should be obvious to any student of the Supreme Court who has read this far that the Court has come no closer to following the original meaning of free exercise than of establishment. Ever since the cases of *Braunfeld* v. *Brown,*[1] *Sherbert* v. *Verner,*[2] and *Wisconsin* v. *Yoder,*[3] the Court has ruled that the Constitution in some circumstances requires that people who do things for religious reasons be treated differently from people who do the same things for other reasons. (The Court in *Yoder*, for example, said that an Amish student who refused to obey compulsory high school education laws must be treated differently from those who object to compulsory education for nonreligious moral reasons.) The Court's misreading of history in these free exercise cases is almost the obverse of its establishment clause error in *Everson*.

The framers of the Constitution and Bill of Rights wanted to create a secular liberal democracy, one in which laws were passed for secular reasons, and in which people, whatever their religious opinions, were expected as citizens to obey the law. They did want to promote religion by encouraging legislatures to write exemptions for religious objectors to otherwise valid civil laws, but these exemptions were considered acts of legislative grace, not constitutional rights.[4] The desire to encourage religion also led them to accept nondiscriminatory aid to religion. This encouragement was given for secular reasons and not for religious ones—because it was thought that religion did some good for civil society. But encouragement could go too far. In other nations, when encouragement became establishment, civil war too often was the result.

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[1] 366 U.S. 599, 81 S. Ct. 1144, 6 L.ed.2d 563 (1961).

[2] 374 U.S. 398, 83 S. Ct. 1790, 10 L.ed.2d 965 (1963).

[3] 406 U.S. 205, 92 S. Ct. 1526, 32 L.ed.2d 15 (1972).

[4] These considerations were most evident during the First Congress's debate over whether to include a clause exempting religious conscientious objectors from militia duty in the Second Amendment. The clause was defeated for two reasons: (1) Some members explicitly rejected the idea that religious exemptions should be treated as rights. Egbert Benson, of New York, for example, said on August 17 that "No man can claim this indulgence of right. It . . . ought to be left to the discretion of the Government," 1 *Annals* 750. (2) Elbridge Gerry, ever concerned about the relative power of the national and state governments, thought that granting a consitutional right of exemption might open a

The modern Supreme Court correctly perceives that the framers wanted to encourage religion. But the Court uses the free exercise clause to grant religion special favors that the framers never thought were required, while prohibiting the nondiscriminatory assistance the framers would have permitted. Similarly, members of the Court correctly perceive that our democracy is at its core a secular democracy. But the Court implements this perception through its reading of the establishment clause, while not permitting a religiously neutral application of civil laws under its reading of the free exercise clause.

It is doubtful that the Court can maintain a consistent free exercise standard if it continues on this path of trying to sort out claims worthy of special protection from claims not deserving it. But the alternative—no special protection for any religious claims—may not be satisfactory either, given the Court's present reading of the establishment clause. If laws are to be applied equally to all, legislatures should have some other means at their disposal for countering the basically hostile impact of modern secular life on religion. Unfortunately, the modern establishment clause and the Court's decisions on the definition of religion[5] make this difficult.

My objections, however, go beyond matters of internal consistency. I believe the Court's position is flawed in a more basic way. The Court has created religious rights where none existed, reopening the controversy that had been settled in the eighteenth century. The Court has permitted religious opinion to stand as judge of the civil realm, while preventing the civil realm from helping religion on civil society's terms. I believe that when the political implications of this for a modern secular democracy are understood, the original understanding will seem attractive as a rule for today, and not simply as a curio for antiquarians.

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wedge for a potentially tyrannical national government that wanted to undermine the states' ability to maintain a viable militia. Gerry thought healthy militias lessened the need for and therefore the threat from a federal standing army. See M. Malbin, "Conscription, the Constitution and the Framers: An Historical Analysis," 40 *Fordham L. Rev.* 805 (1972). The clause was adopted by the House, rejected by the Senate, and omitted from the Second Amendment by the conference committee.

[5] See, in addition to Yoder: U.S. v. Seeger, 380 U.S. 163, 85 S. Ct. 850, 13 L.ed.2d 733(1965); Welsh v. U.S., 398 U.S. 333, 90 S. Ct. 1792, 26 L.ed.2d 308 (1970).

The First Amendment and the Future of American Democracy

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CHAPTER 1

Religion and the Founding Principle

IT is unfortunate, and a measure of our contemporary difficulties, that too many Americans today would hesitate to agree with the Englishman Gladstone that the American Constitution was "the most wonderful work ever struck off at a given time by the brain and purpose of man." It is not fashionable, even in America, to praise American things these days. It is also true, I think, that most of those who would agree with Gladstone about the Constitution would do so because of the Bill of Rights, an addition to the original Constitution, and especially the First Amendment. The First Amendment has become the most famous and praiseworthy part of the Constitution. There is good reason for this, for, to speak here only of its religious provisions, the principle of the separation of church and state provides the foundation on which free government rests. That principle has been celebrated in countless books and scholarly articles and is embodied in our public life as a nation—so much so, perhaps, that we tend to forget (or, at least, to fail fully to appreciate) the role played by the religious question in the beginning of free government. We acknowledge that the United States is a liberal democracy, but we may forget that the term *liberalism,* in its modern sense, was coined to denote the liberation from the power of church and churchmen. In the beginning of free and liberal government, no question was more important than the question of religion, and none played so prominent a role in the thought of the pertinent theorists—Hobbes, Locke, Spinoza, Bayle, and to a lesser but still significant extent, even Montesquieu. Even if it could be said that they solved the problem in principle, it was left to the American Founders to be the first to solve it, or to try to solve it, in practice.

The Separation of Religion and State

The Constitution, as it was sent by the Philadelphia convention to the people of the states for their ratification, contained a single provision dealing with religion: the proscription in Article VI of religious tests for office. This did not satisfy the six states (or five states plus the minority in Pennsylvania) that included a demand for a guarantee of the rights of conscience in their general call for a bill of rights. The typical demand made by these states was for an amendment protecting freedom of conscience, but no one, ratifier or nonratifier (or, as the nonratifier Elbridge Gerry inelegantly put it, "rats or antirats") expressed an opinion opposed to freedom of conscience. There was simply no debate on the subject, nor even a recorded difference of opinion, and this is not unrelated to the fact that freedom of conscience has not been an issue in the subsequent history of the country. More strikingly, especially to anyone with a memory of British and even American history during the seventeenth and eighteenth centuries, the fact that freedom of conscience was not an issue shows the great extent to which the religious question had already been settled in America at the time the Constitution was being written. There was a debate as to whether an amendment was necessary to protect it, but that posed no serious problem. There was considerable controversy over the question of whether the House should take time from the consideration of the pressing necessity to establish the offices of government in order to honor a pledge (which some of them did not regard as a pledge) to add a bill of rights to the Constitution; but that too proved tractable. The real difference was not discussed at all, although it can be glimpsed in the variety of formulations given the amendment; this was a difference that divided the participants among themselves and divided the more profound of them within themselves. In one sense, they were opposed to religion, to the organized religions of the day; in another sense, they recognized the role religion could play—and perhaps would have to play—in free government. Unlike freedom of conscience, this difference, the ambiguity on this aspect of the religious question, gave rise to an issue that has played a role in the subsequent history of the country and underlies the disagreement concerning the meaning of the First Amendment.

In 1947, for example, the Supreme Court said of the establishment clause that it means that neither a state nor the federal government may set up a church, pass laws aiding one religion or all religions, or prefer one religion over another.[2] This is a view widely held among constitutional scholars, but it is by no means the only view. It was not the view held by Edward S. Corwin or by Mark DeWolfe Howe,[3] or by others still living and writing. It was not the view of the Court when it upheld the statute granting tax exemptions to churches for properties used for worshiping purposes.[4] Presumably, it was not the view of Mr. Justice Douglas when, in the second "released time" case, he wrote that Americans "are a religious people whose institutions presuppose a Supreme Being," although it was his view, a few years later, when he wrote that the purpose of the religious clauses was "to keep government neutral, not only between sects, but between believers and nonbelievers."[5] Of course, the federal government may not "set up a church"; there has never been any argument about that. But may it aid religion, provided it does so on a nondiscriminatory basis? May the states? These are the questions agitated today, and a good deal depends on the answers given. Because they are so important, we are not surprised to learn that they were raised—and answered—during the debates on the religious clauses in the First Congress.

In the Virginia ratifying convention, Patrick Henry had complained that under the proposed Constitution the states would lose their sovereignty which would thereby make insecure the rights of conscience protected under the state constitutions and, specifically, under the Virginia constitution. In response to Henry, and to others who in other states had expressed similar apprehensions, Madison opened the debates in the First Congress by proposing an amendment forbidding the establishment of "any national religion" or the infringement of "the full and equal rights of conscience." The issue here had to do with the relation of nation and states; but it was not much of an issue. The states had sought some reassurance, and the Founders had no objection to providing it. The House Select Committee formulated Madison's proposal as follows: "no religion shall be established by law, nor shall the equal rights of conscience be infringed." This led Benjamin Huntington of Connecticut to express the fear that this language could be read—not by him but by others—to forbid state laws requiring contributions in support of ministers of religion and places of worship. In addition, although he favored the free exercise of religion, he was anxious, he said, to avoid any language that might "patronize those who professed no religion at all."[6] He too was concerned with the nation-state relationship, but the source of his concern was his desire to allow the states to provide aid to religion.

Samuel Livermore of New Hampshire and Elbridge Gerry of Massachusetts were also intent on preserving their state laws in aid of religion and fostering the public worship of God. Gerry proposed to change the establishment clause to make it read "that no religious doctrine shall be established by law." Livermore, with Gerry's support, wanted to change it to read

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"that Congress shall make no laws touching religion,'"[7] which, if adopted (and the House at one point did adopt it by a vote of 31-20),[8] would have prevented national laws "touching" or affecting or regulating or interfering with state laws on the subject of religion, including those laws that could be said to have established religion.[9] Madison's answer to Huntington's fear was the suggestion that the word "national" be "inserted before religion," thus leaving room for these state establishments; but Gerry, for the same reason that had earlier led him to vote against ratification of the Constitution in the Massachusetts ratifying convention, objected to the very use of the word "national."

Madison's amendments, as he had introduced them at the outset of the debates, would have forbidden the states, as well as the federal government, to "violate the equal rights of conscience." This suggests what we know from his other writings to be the case—that he was opposed to state as well as to federal establishment. In fact, he regarded this restriction on the states as "the most valuable amendment in the whole list,'"[10] a judgment in line with his well-known opinion that the states were much more likely than the federal government to be ruled by factions, which would deprive religious minorities of their rights. This restriction on the states was adopted by the House and was lost only in the Senate.

Finally, on August 20, 1789, the House adopted the amendment in the style proposed by Fisher Ames of Massachusetts: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.'"[11] With insignificant stylistic changes, this is the form in which it was sent to the Senate. The following conclusions may be drawn from the House action: both the state and the federal governments were forbidden to infringe the rights of conscience, and, assuming there was a distinction (the Senate was to see none), the federal government was also forbidden to prevent the free exercise of religion; and the federal government (but not the states) was forbidden to establish religion. But did Ames, Huntington, Gerry, and Livermore, as well as some others, think that the federal government was also being forbidden to aid religion? Although we have no record of their debates, we know from the actions taken that this was made an issue by the Senate.

The House amendments were formally read in the Senate on August 25, and, after a debate that was interrupted more than once, the Senate completed its consideration of them on September 9. As mentioned, the single amendment placing restrictions on the states was dropped;[12] the amendment dealing with religion and that dealing with speech and press were combined into one; various changes were made to others; but, on the whole, they were adopted by the Senate in the form in which they came from the House. The establishment clause, however, was the subject of a number of amendments proposed and occasionally adopted. The first of these, offered on September 3, would have forbidden Congress to make any law "establishing one religious sect or society in preference to others"—which is certainly less ambiguous on the meaning of establishment than either the House version or the First Amendment as finally adopted—and it dropped the free exercise clause while retaining that part of the House version prohibiting infringement of the rights of conscience. It was defeated, then accepted; but the acceptance did not have the effect of ending the debate. After defeating a series of proposed changes, the Senate ended the day by returning to the House version, including the free exercise clause, but this time dropping the clause protecting the rights of conscience. From this it would appear that the senators regarded the latter as redundant, and it does not appear again. There continued to be some dissatisfaction with the establishment clause, however, with some senators anxious, and ultimately a majority of senators willing, to be more precise as to what would constitute an establishment. Hence, on September 9, the Senate adopted the following version, and this was the one it sent back to the House: "Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion...."[13] This seemingly would have left intact the various state establishments and would have permitted federal aid to religion on a nondiscriminatory basis. However, since we have no record of what was said in the Senate, we cannot know for certain that this was the intent.

The House refused to accept this version and asked for a conference. The Conference Committee, with Madison one of the House conferees, proposed the amendment in the form that was finally adopted by the required two-thirds vote in each house and ratified by the required three-fourths of the states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." Here, then, is the origin of the troublesome phrase "respecting an establishment of religion."

Irving Brant, in his biography of Madison, says "there can be little doubt that this was written by Madison," and that, "of all the versions of the religious guaranty, this most directly covered the thing he was aiming at—absolute separation of church and state and total exclusion of government aid to religion."[14] But this is not altogether accurate. For example, Madison did not succeed in his attempt to place restrictions on the powers of the states with respect to the rights of conscience. Moreover, even if it is true that Madison was the author of this final formulation of the First Amendment, it is not necessarily the case that it was intended to promote the "absolute separation of church and state" or to forbid all forms of governmental aid to religion, even aid from the federal government. After all, this same First Congress, with Madison's approval, readopted the Northwest Ordinance of 1787, first passed by the Continental Congress, the third article of which reads as follows: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of learning shall forever be encouraged.''[15] It is not easy to see how Congress, or a territorial government acting under the authority of Congress, could promote religious and moral education under a Constitution that promoted "the absolute separation of church and state" and forbade all forms of assistance to religion. Whatever his own views—and we shall turn to those shortly—the situation that prevailed in the country and was reflected in the debates on the First Amendment would have required Madison to accommodate the views of others in whatever formulation he arrived at. The Senate wanted to prohibit federal laws "establishing articles of faith, or a mode of worship"; the House wanted to prohibit federal laws establishing religion; they agreed to the final version prohibiting laws "respecting" *an* establishment of religion. The question concerns the meaning of the words "respecting an establishment of religion."

The House debate had begun on the Select Committee's version of the amendment, which read as follows: "No religion shall be established by law, nor shall the equal rights of conscience be infringed." The debate was opened by Peter Sylvester of New York, who objected to this formulation because "it might be thought to have a tendency to abolish religion altogether."[16] So to construe the clause seems unnecessarily apprehensive—unless Sylvester had reason to believe that to forbid the establishment of religion by law would be to forbid all governmental assistance to religion, and that without this assistance religion would languish and eventually die. What is of interest is Madison's reply:

> Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish *a* religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State conventions, who seemed to entertain an opinion that under the clause of the constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the constitution, and the

> laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience, and establish *a* national religion; to prevent these effects he presumed the amendment was intended, and he thought it as well expressed as the nature of the language would admit."[17]

Madison here twice adds the article—*a* religion—which, as a recent student of the debates has written, had it appeared in the original, would have made it virtually impossible for Sylvester to read the clause as forbidding "nondiscriminatory assistance to religion."[18] By the addition of the article, Madison seems to have expressed a willingness to accommodate those who wanted to permit such assistance. Can this also be said of the phrase "respecting an establishment of religion"? Perhaps; perhaps even probably. There were those who insisted on room for such assistance, and the language permits it. What is beyond question is that both the states and the federal government have traditionally acted as if the language permitted assistance of some sort. "Our system," as Justice Douglas had cause to complain, is "honeycombed" with laws that provide that assistance[19] at both the federal and the state levels. And when he and others insist that this is in violation of the Constitution, which was intended "to keep government neutral, not only between sects, but also between believers and nonbelievers,"[20] they are required to look elsewhere for supporting authority—to Madison's "Memorial and Remonstrance," for example. Written in opposition to the Virginia bill "for establishing a provision for teachers of the Christian religion," this famous statement of Madison's own views calls for the separation not only of church and state but of religion and state. But what is clear is that more than Madison's own views went into the First Amendment.

In the past, and especially in that recent English-speaking past well known to the Founders, religion had been the most divisive of political issues, the cause of civil strife and wars, of test oaths and recusancy, of revolutions and regicides, of political problems that threatened to defy solution, of, as Madison put it in the "Memorial and Remonstrance, "torrents of blood" spilled in the vain attempt to "extinguish Religious discord."[21] What is noteworthy in the debates leading to the adoption of the First Amendment is the absence of that kind of religious problem. It is not the differences among the participants in that debate but rather the extent of their agreement that is remarkable. What divided them were differences on what can only, in the light of that history, be called secondary issues: whether government depended in some way on religion and, therefore, whether government should be permitted, in some way, to foster religion, and whether this should be done at the federal as well as the state level. On these questions Madison especially differed from Samuel Livermore and his friends; but even Madison made no attempt in the First Amendment debates to have Congress adopt the policy he favored so eloquently and effectively in his "Memorial and Remonstrance." Compared to these differences, the agreement among them was massive. There was no dispute about freedom of conscience or the free exercise of religion; the adoption of the clause protecting free exercise was an altogether perfunctory matter, giving rise to no difference whatsoever. There was no dispute with respect to the principles on which the Constitution was built; stated in its most radical form, they all agreed that our institutions do *not* presuppose a providential Supreme Being. This is a fact of considerable significance, and, as I shall argue in Chapter 3, it allows us to understand why the Founders distinguished between religious and political opinion, and why they could accord absolute freedom to the one and not to the other.

One of the striking facts about the original, unamended Constitution is the absence of any passage invoking the name of God, providing for the public worship of God, according special privileges or places to churchmen, or stating it to be the duty of Congress to promote Christian education as part of a design to promote good citizenship. There is nothing in it similar to the provision in the Massachusetts constitution in 1780 declaring it to be not only the right but also the duty of the "towns, parishes, precincts and other bodies politic" to support, and to provide money for the support of, "the public worship of God."[22] Instead, the Constitution merely makes it possible for legislative majorities to enact—or not enact—laws of this sort. Yet what is regarded as primary or essential is not left to the discretion of legislative majorities or to chance. We have grown so accustomed to what we today call the secular state that we tend to ignore the significance of the absence of such provisions in the federal Constitution. If the Founders had intended to establish a Christian commonwealth (and, under the circumstances, it could not have been any other variety of religious commonwealth), it was remiss of them—indeed, sinful of them—not to have said so and to have acted accordingly. If they thought that all government was derived from God, they would have been remiss in not establishing constitutional institutions calculated to cause or help Americans to live according to His laws. Instead, the first of Madison's amendments, proposed in response to the demands of the states for a bill of rights, was a declaration insisting not that all power derives from God, but "that all power is originally vested in, and consequently derives from, the people."[23] Instead of speaking of men's duties to God and to each other, the Founders spoke—and again in this first of the proposed amendments—of men's indubitable, unalienable, and indefeasible rights, including the right freely to acquire and use property.

All this is not to say that Americans were not, in some sense—in most cases, some subordinate sense—a "religious people." Sylvester, Huntington, Livermore, and Gerry were indeed speaking on behalf of religion, but even their cause was a far cry from the causes defended by religious enthusiasts of the past. Massachusetts did require in its 1780 constitution that men had a duty publicly to worship God—but this was significantly qualified by the concession that each man do this according to "the dictates of his own conscience." What is more, this duty was imposed for a political reason. The towns "and other bodies politic" were to provide support for "the public worship of God" *because* "the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality."[24] This position was better stated in the Massachusetts ratifying convention when John Turner said that "without the prevalence of Christian piety and morals, the best republican constitution can never save us from slavery and ruin."[25] On the basis of such statements, it might even be said that whereas our institutions do not presuppose a Supreme Being, their preservation does. This is a venerable opinion. Tocqueville goes so far as to say that it was the opinion of all Americans:

> Indeed, it is in this same point of view that the inhabitants of the United States themselves look upon religious belief. I do not know whether all Americans have a sincere faith in their religion—for who can search the human heart?—but I am certain that they hold it to be indispensable to the maintenance of republican institutions. This opinion is not peculiar to a class of citizens or to a party, but it belongs to the whole nation and to every rank of society.[26]

To some extent, Americans were taught this political lesson by the Founders.

In his First Inaugural, Washington paid homage "to the Great Author of every public and private good" and suggested that Americans, above all peoples, must "acknowledge and adore the Invisible Hand which conducts the affairs of men." Statements similar to these can be collected in the hundreds—and have been[27]—to the end of supporting the proposition that the United States is, or was intended to be, a Christian or, less specifically, a religious commonwealth—at any rate, the sort of commonwealth whose institutions "presuppose a Supreme Being." At the beginning, there must have been Americans who truly believed this, and believed it in an altogether unsophisticated way; but this cannot be said of the men whom we call the

Founders. It cannot be said of Washington, who, rather than God, to say nothing of Jesus of Nazareth, invoked the name of "that Almighty Being," and "the Great Author," and "the Invisible Hand," and "the benign Parent of the Human Race." There were others who made specific references to the God of the Scriptures, but Washington here sounds more like the Freemason he was than a pious Christian in an orthodox sense. His reasons for acknowledging divine assistance in the constituting of the United States, and for doing it in this manner, are suggested by the following statement in his Farewell Address:

> Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity. Let it simply be asked where is the security for property, for reputation, for life, if the sense of religious obligation *desert* the oaths, which are the instruments of investigation in courts of justice? And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

In the light of this statement, we are permitted to say that Washington, too, looked at religion from a political viewpoint, and from this perspective saw reason to doubt that a civil society founded on the rights of man could sustain itself in the absence of the extraneous support provided by religious belief. Clearly, he was one of Tocqueville's Americans who held religion to be "indispensable to the maintenance of republican institutions." Even more significantly, considering his reputation, Jefferson, too, was persuaded of the necessity of some sort of religious conviction—not for himself or Washington and others with "minds of peculiar structure" and "refined education," but for the great body of Americans. "And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God?" Jefferson asks this question in his discussion not of religion—he had apparently disposed of that subject in the previous query (or chapter)—but of slavery, and in that context its appearance is especially striking. Slavery exists in Virginia, but it is contrary to the rights of man and natural justice. Not only is it contrary to natural justice, but its effects are also deleterious to master and slave alike. It must be abolished. Yet Jefferson has no illusions about the strength of the passions that stand in the way of that just conclusion. Greed and, especially in a warm climate, sloth stand in the way: "For in a warm climate, no man will labour for himself who can make another labour for him."[28]

Thus, natural rights are opposed by these passions, liberty by economic interest; and liberty can win in this contest only if it gains the support of religious conviction—specifically, the conviction in the minds of the people that liberty is the gift of God. Wisdom might dictate that it be the policy of the government to promote this conviction, which it can do by supporting religion in the form of a "multiplicity of sects" while favoring no particular one of them. Pennsylvania and New York, Jefferson had pointed out in the previous query, had shown the way for Virginia (and the United States as a whole). They had "long subsisted without any establishments," but religion was well supported there—"of various kinds indeed, but all good enough" from his political point of view, "all sufficient to preserve peace and order [and] morals."[29] Harvey C. Mansfield, Jr. has stated the conclusion to be drawn from this: "For the sake of liberty, government must support religion in general, but no particular religion."[30] That this was Washington's opinion we know from the Farewell Address, and it explains the style of his First Inaugural. Government cannot afford to be neutral "between believers and nonbelievers"; good government depends on the existence of a certain kind of believer because there is, or was thought to be, a connection between religious belief and the moral character required to restrain the passions inimical to liberty. If religion "does not impart a taste for freedom," Tocqueville was to observe a few years later, "it facilitates the use of it."[31] As we might expect from a man whose thought was strongly influenced by a tradition derived from Rousseau, Tocqueville's opinion was that liberty cannot govern "without faith [and] is more needed in democratic republics than in any others."[32]

But the Constitution was ordained and established to secure liberty and its blessings, not to promote faith in God. Officially, religion was subordinate to liberty and was to be fostered—by public assistance, for example, and by exemplary admonitions on state occasions—only with a view to securing liberty. Moreover, before religion could be publicly fostered, it had to be reformed and rendered harmless. On the basis of all the evidence available to us, however, it would appear that this "reformation" had largely taken place in America prior to the writing of the Constitution.

The Religious Problem

> When indeed Religion is kindled into enthusiasm, its force like that of other passions is increased by the sympathy of a multitude. But enthusiasm is only a temporary state of Religion, and whilst it lasts will hardly be seen with pleasure at the helm [of state]. Even in its coolest state, it has been much oftener a motive to oppression than a restraint from it.[33]

Instead of establishing religion, the Founders established religious *freedom,* and the principle of religious freedom derives from a nonreligious source. Rather than presupposing a Supreme Being, the institutions they established presuppose the rights of man, which were discovered by Hobbes and Locke to exist prior to all government—in the state of nature, to be precise. To secure these rights, it is necessary for men to leave the state of nature, which they do by giving their consent to civil government. Nevertheless, the rights presuppose the state of nature, and the idea of the state of nature is incompatible with Christian doctrine. According to Christian doctrine, "the first and great commandment" is to love God, and the second, which is like unto it, is to love one's neighbor as oneself. In the state of nature, however, man is not obliged to love anyone, but merely to preserve himself and, what is more to the point, "to preserve the rest of mankind [only] when his own preservation comes not in competition."[34]

Just as they spoke frequently of natural rights, of founding government in order to secure these rights, and of compacts being "the vital principle of free government as contradistinguished from governments not free,"[35] the Founders spoke of and took seriously the state of nature. For them this was neither a "verbal construct" nor a purely hypothetical supposition; rather, it was the situation in which man found himself originally and into which he would lapse under certain conditions. One of the earliest debates in the First Congress turned on the question of whether Americans, upon declaring their independence of Great Britain, had "reverted" to a state of nature. The question was posed when a petition was introduced calling upon the House of Representatives to declare William Smith of South Carolina ineligible to take his seat in the House because he did not meet the constitutional requirement of seven years' citizenship. As a young boy of twelve in 1770, Smith had gone to England to be educated; he had lost both his parents during his absence from America, had endeavored to return during the Revolutionary War, but had suffered a series of misadventures and difficulties, including a shipwreck. He finally managed to reach Charleston, South Carolina, in November 1783. After serving in the state legislature, he was duly elected to the House of Representatives and appeared to take his seat in the First Congress, only to be met, in May 1789, with the challenge that he had not been a citizen at his birth in 1758—indeed, he, like most if not all the others in Congress, was born a British subject—and had not, unlike the others, acquired it by fighting in the Revolution, by taking an oath to one of the states, by tacit consent, or, finally, by adoption.

Madison, who supported him, replied that Smith was a citizen "on the Declaration of Independence" (by which he apparently meant on account of, or by virtue of, the Declaration) and that he continued to possess citizenship unless he had somehow forfeited it. The Declaration of Independence had absolved his "secondary allegiance" to George III but not his allegiance to the society of which, even as a child, he had been a member. "This reasoning will hold good," Madison said, "unless it is supposed that the separation which took place between these States and Great Britain, not only dissolved the union between these countries, but dissolved the union among the citizens themselves: that the original compact, which made them altogether one society, being dissolved, they could not fall into pieces, each part making an independent society; but must individually revert into a state of nature." Madison did not "conceive that this was, of necessity, to be the case." Such a revolution did not, he believed, "absolutely take place." The colonies remained "as a political society, detached from their former connexion with another society, without dissolving into a state of nature; but capable of substituting a new form of Government in the place of the old one, which they had, for special considerations, abolished."[16] The difficulty of the question is one that must be acknowledged by any reader of the last chapter of Locke's *Second Treatise* ("Of the Dissolution of Government"), and Madison spoke without his customary assurance.

Not so James Jackson of Georgia. His reading of the situation was that there had been only one allegiance to Great Britain and, that being dissolved, they had all, Smith included, experienced "a total reversion to a state of nature amongst individuals." After this, "every man made his election for an original compact, or tie, which, by his own act, or that of his father for him, he became bound to submit to.'"[37] This Smith had not done, or had done only on his return in 1783, a mere six years earlier, and therefore he was not eligible to take his seat in the House. Fortunately for Smith, the House voted overwhelmingly in his favor—that is, overwhelmingly in favor of Madison's reading of Locke and of the events of 1776. What is of primary interest here is the source of the guidance the legislators sought on such questions, or the source of the principles on which they acted politically: so far as the Constitution of the United States is concerned, in the beginning was not the word ("and the word was with God, and the word was God"); in the beginning was the state of nature, and the word was with the philosophers of natural rights. It was from them that the Founders learned the new "science of politics,"[38] and with it the principles of free government.

These principles require the establishment of religious freedom, the right of men to hold whatever opinions they choose respecting God or gods. That men must have this choice is not itself a matter of choice or indifference. Jefferson insisted on this, and Jefferson is acknowledged to be the authoritative American spokesman on this subject. In his *Notes on the State of Virginia* (the only book he ever wrote), which contains probably his deepest reflections on political questions, he said that because their institutions are not built on a religious truth, Americans are not entitled to regard it as an injury—or an injury for which the law will provide a remedy—for their neighbors to say there are twenty gods or no God. Such religious opinions neither pick their pockets nor break their legs, as he put it in his famous formulation;[39] and because such religious opinions do not injure them or the commonwealth, their neighbors are entitled to an absolute right to hold them. Any denial of this would, of necessity, be based on a particular religious doctrine. For example, a law forbidding the opinion that there are twenty gods would arise out of the opinion that there is one God, or no God, or some other number of gods; and to legislate on such a basis would be to transform what in the eyes of the Constitution is merely an opinion—and, officially at least, must remain so—into an official truth, and this would be incompatible with the Constitution and the political philosophy underlying it. Futhermore, religious freedom must be established because "difference of opinion is advantageous in religion," not advantageous to religion (although that may be true incidentally), but *politically* advantageous. That is, it is politically advantageous to have religious differences in the country, to have a variety of religious sects, because the "several sects perform the office of a Censor morum over each other."[40] The rights of man are protected by a "multiplicity of sects," as Jefferson's friend and colleague Madison said in the 51st *Federalist,* and what matters is the rights of man (and not a particular religious doctrine concerning eternal salvation or anything else). Thus, the establishment of religious freedom rests on the proposition that there can be no officially recognized creed or doctrine—that, officially, all religious doctrines are equal—and Jefferson and Madison did their best to establish this principle not only in federal public law but in the public law of Virginia as well. The state religious establishments might have to be accommodated in practice, but they were, nevertheless, incompatible with the principle on which the country was founded.

While the United States recognizes no religious truth, it is founded on the "self-evident" philosophical truth respecting the natural freedom and equality of all men. Being naturally free, men contract one with another to form civil society—"all power is originally vested in, and consequently derives from, the people." This contract represents their agreement to be governed—their consent to be governed—and this agreement or consent, which is the beginning of all legitimate government, is required by the fact of their natural freedom and equality. Being equal with respect to natural right, and however unequal they may be according to any religious doctrine or in any other respect, no man may justly rule another without his consent (although, prior to the formation of the United States, this right was not recognized or acknowledged in practice). Kings, in the course of time and from place to place, may have been required to make laws only with the consent of the lords spiritual and temporal and the commons in parliaments assembled, but they claimed to hold their crowns by the grace of God, independent of the consent of those they governed. In this fundamental political respect, men were held to be unequal.

Discovery of the rights of man changed that. "All eyes are opened, or opening, to the rights of man," Jefferson said. "The general spread of the light of science has already laid open to every view the palpable truth, that the mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately, by the grace of God."[41] This "palpable truth" is a scientific truth, not a religious truth or opinion but a truth discovered by the new political science; and the United States was the first country to organize itself on it. It was the first country to recognize the self-evident truth of the natural freedom and equality of all men and, therefore, that legitimate government can arise only out of consent. It was, as the motto on its Great Seal proclaims, a *novus ordo seclorum*, a new order of the ages. In this decisive respect, it was the first "new nation," and its newness consisted in large part in the nonreligious character of its founding principle. The uniqueness of this fact is emphasized in the thought of John Locke, the Englishman frequently called "America's philosopher," whom Jefferson, referring to him as one of the three greatest men who ever lived, accepted as one of his teachers. In the first of his *Two Treatises of Government*, Locke goes to what today are regarded as extraordinary lengths to show what we would regard as self-evident—namely, that kings do not rule by virtue of any donation from God to Adam and his heirs. This having been shown, he says at the outset of the *Second Treatise*, it is necessary "to find out another rise of government, another original of political power,"[42] and by saying this, he suggests that the only alternative to government based on the religious doctrine of divine donation is, as it turns out, government based on the nonreligious doctrine of the rights of man and the contract men make with each other. To secure these rights, governments are instituted among men.

Such a government was not established with the settling of the American colonies, and although its principles were well known to Jefferson and his colleagues, it had not been fully established in Virginia even by the end of 1781, when Jefferson wrote his *Notes on the State of Virginia.* As he saw it, the people of Virginia had not yet been sufficiently instructed in these principles, even after they had declared their independence. "The convention of May 1776, in their declaration of rights, declared it to be a truth, and a natural right, that the exercise of religion should be free; but when they proceeded to form on that declaration the ordinance of government, instead of taking up every principle declared in the bill of rights, and guarding it by legislative sanction, they passed over that which asserted our religious rights, leaving them as they found them."[43] Heresy was, in principle, still punishable under the laws of Virginia; a Christian could deny the doctrine of the Trinity only at the price of his right to hold "any office or employment ecclesiastical, civil, or military" and, if he should persist in his denial, at the price of his liberty, his right to sue or inherit property, and even his "right to the custody of his own children." This, Jefferson complained, "is a summary view of that religious slavery under which a people have been willing to remain, who have lavished their lives and fortunes for the establishment of their civil freedom." Men are endowed with natural rights, and rulers have no authority over these rights except as men, in the compact forming civil society, have submitted to them. But it was Jefferson's view—and he was sustained in this by the existence of the Virginia law, as well as by the strength of the opposition he and Madison had to overcome in order to establish religious freedom in the state—that too many Virginians persisted in the error of regarding it as proper for the rights of conscience to be submitted to government.

This Virginia law and the religious establishments that continued to exist in some other states were vestiges of the orthodox Christianity that had come under attack in the seventeenth century from the new political science. It had to be attacked or somehow displaced, because, as Professor Mansfield has said, any revealed religion is incompatible with modern natural right. A revealed religion is revealed only to the godly, and the godly are only too likely "to take advantage of the favor of revelation to demand political power for themselves or their allies."[44] In a limited way—limited when compared with the claims staked out by the priests and princes against whom Hobbes, Spinoza, and Locke had to contend—this is what the nominally pious Virginians were doing. To destroy the political power of revealed religion, it was first necessary to destroy or displace the authority of revealed religion, which, in the Europe of the seventeenth century, meant the authority of Scripture and, especially, of the New Testament, wherein the proof of Jesus' authority is supplied by "the multitude of miracles he did before all sorts of people." This is necessary because "where the miracle is admitted, the doctrine cannot be rejected." Thus Hobbes wrote a critique of "miracles, and their use";[45] Locke wrote a *Discourse of Miracles,* from which the passage quoted above is taken;* and Spinoza attempted to demonstrate that

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*Locke, *Works* (1812 ed.), vol. 9, p. 259. The nature of Locke's critique of miracles is suggested in the following passage (as well as in the fact that he specified that the *Discourse* be published only after his death): "For miracles being the basis on which divine mission is always established, and consequently that foundation on which the believers of any divine revelation must ultimately bottom their faith, this use of them would be lost, if not to all mankind, yet at least to the simple and illiterate, (which is the far greatest part,) if miracles be defined to be none but such divine operations as are in themselves beyond the power of all created beings, or at least operations contrary to the fixed and established laws of nature. For as to the latter of those, what are the fixed and established laws of nature, philosophers alone, if at least they, can pretend to determine." (Ibid., p. 264.)

"God cannot be known from miracles."[46] Christianity had to be made reasonable, which is why Locke, in addition to writing *Some Considerations of the Consequences of the Lowering of Interest and Raising the Value of Money* and helping to found the Bank of England, found it necessary to write *The Reasonableness of Christianity.*

Jefferson, of course, was a statesman, not a philosopher, but his statesmanship was informed by what he had learned from the natural rights philosophers who preceded him. From them he had learned that Christianity had to be made reasonable, and he was willing, albeit in words that he was careful to keep from the public, to commit his thoughts to paper. He denied the divinity of Christ. He nevertheless described himself as a Christian—not the sort of Christian that any of the Christian churches could have recognized, but a Christian "in the only sense [Jesus] wished anyone to be." He was perfectly willing to attribute to Jesus "every *human* excellence," which, he insisted against the churches, was all Jesus ever claimed for himself.[47] The so-called Christians think otherwise, said Jefferson, because they had been corrupted, taught to believe in the Bible and that the Bible is a record of God's self-revelation to man. This doctrine, wholly false in his judgment, Jefferson traced to the fact that Jesus, like Socrates, "wrote nothing himself," thereby making it possible for "the most unlettered & ignorant men [writing] from memory & not till long after the transactions had passed [to commit] to writing his life and doctrines...."[48] Hence, the doctrines "he really delivered...have come to us mutilated, misstated, & often unintelligible," and they were further "disfigured by the corruptions of schismatising followers, who have found an interest in sophisticating & perverting the simple doctrines he taught by engrafting on them the mysticisms of a Grecian sophist, frittering them into subtleties, & obscuring them with jargon, until they have caused good men to reject the whole in disgust, & to view Jesus himself as an imposter."[49] His moral doctrines, Jefferson went on, are in fact "pure & perfect" and inculcate a "universal philanthropy, not only to kindred and friends, to neighbors and countrymen, gathering all into one family, under the bonds of love, charity, peace, common wants and common aids."[50]

To say that Jefferson advocated religious freedom and the separation of church and state, and to leave it at that, is to miss what was then the radical character of his views on religion. Americans, no more than the immediate addressees of Locke's writings, would not accept a policy of freedom and separation, or of toleration (and Jefferson made copious notes and significant use of Locke's *Letter Concerning Toleration*[51]), until or unless they were persuaded of the ground of this toleration, and the ground of this toleration is the opinion that traditional Christian doctrine is false. When it is shown to be false and, more practically, when the truth of this falseness is "by the light of science" spread among and accepted by the mass of mankind, it will be possible for men to attach themselves more firmly to the God of the Declaration of Independence—"Nature's God"—and the religious problem will be solved and free government secured.

No book is needed to read the will of "Nature's God." The American who set out most vigorously and openly to expound the new religious principles was not Jefferson, however, but Tom Paine. Unlike Jefferson, and much more openly than the equally radical but far more subtle critiques written by his more learned seventeenth-century predecessors, Paine does mount an attack on miracles, prophecy, and mystery. Also unlike Jefferson, who concealed his most radical religious views from the eyes of the public, Paine, dedicating his book to his "fellow citizens of the United States of America," informs them that Christianity is the most "absurd," "repugnant," "derogatory," "unedifying," and "inconsistent" religion ever "invented."[52] The Bible, he says, is a book of fables, not the revealed word of God. God has revealed himself in his works, as first cause of these works. God can be discovered only by studying his created world, and the Bible and the churches are positively detrimental to this project; they have traditionally stood as obstacles in the path of science and will continue to do so as long as they hold power over the minds of men.

Paine does his best to destroy that power in page after page of argument, ridicule, anger, and unconcealed contempt for the enemies of what he regards as scientific truth. This truth does not need the "crutch" of fable[33]—or, as Jefferson put it, "truth can stand by itself."[34] God, "the Almighty Lecturer," speaks to man not indirectly through the Bible, but directly in His display of "the principles of science in the structure of the universe [and] has invited man to study and to imitation."[35]

Jefferson never deigned publicly to speak so boldly, but there is nothing in the *Age of Reason* that does not find a place in the thoughts Jefferson committed to letters and other such papers. If we are no longer shocked by them, as Paine's contemporaries were for a while shocked by his writings, that merely shows the extent of the change that has occurred in our opinions. Despite the extravagance of his presentation, Paine was a representative spokesman of his age, the Age of Reason. It is not by chance that he wrote another book, entitled ***Rights of Man,*** or that he thought it appropriate to dedicate it to George Washington.

Under the reign of the doctrine of the rights of man, the day might come, and Paine and Jefferson in their different ways worked to hasten its coming, when the typical Anglican priest of Virginia would have long since ceased his agitation for the presumed benefits of establishment and would be less concerned with what separates the various religions than with what they have in common. He might come in time to speak of the "Judeo-Christian tradition," for example. Whatever might be said of this from the point of view of orthodox Anglo-Catholicism and orthodox Judaism (which, Jefferson said, was also in need of "reformation" and to "an eminent degree"[36]), it would bespeak (and, of course, does bespeak) a situation in which both Anglo-Catholic and Jew, as well as others, were allowed to enjoy the rights to which they are entitled as men: to live in liberty and to worship as they please, because neither would be inclined to prevent the other from exercising these rights, or to think it important or even legitimate to do so. Washington stated this perfectly in his answer to an "Address" from the Hebrew Congregation of Newport, Rhode Island:

> It is now no more that tolerance is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights. For happily the government of the United States, which gives to bigotry no sanction, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens, in giving it on all occasions their effectual support.... May the children of the Stock of Abraham, who dwell in this land, continue to merit and enjoy the good will of the other inhabitants, while everyone shall sit in safety under his own vine and fig-tree, and there shall be none to make him afraid.[57]

The origin of free government in the modern sense coincides with and can *only* coincide with, the solution of the religious problem, and the solution of the religious problem consists in the subordination of religion. In prior times, it was thought to matter whether a nation believed in twenty gods or one God or no God, or whether the one God was this God or that God. That is why the question of religion used to figure so prominently in the works of the political philosophers. Then it was a political question; now it is not. One can say that the natural rights philosophers spent so much time on the religious question in order to make it possible for the politicians who followed them to ignore it.

That this lesson was learned by Americans (and not by the besieged residents of Northern Ireland, for example) was obvious even in Tocqueville's time;[58] but it is not at all obvious that it was learned directly from Paine's intemperate presentation. It is more likely that Americans—whose strong attachment to material comforts led Jefferson in 1781 to predict that, on the successful conclusion of the Revolutionary War, they would be concerned solely with making money—were led by this attachment to accept an "understanding of Christianity which [was] not in conflict with it."[59] Paine could have profited from Montesquieu's advice: the way "to attack a religion is by favor, by the commodities of life, by the hope of wealth; not by what drives away, but by what makes one forget; not by what brings indignation, but by what makes men lukewarm, when other passions act on our souls, and those which religion inspires are silent. *Règle générale:* with regard to change in religion, invitations are stronger than penalties."[60] Professor Pangle's comment on this makes the point even clearer, and more clearly relevant to America: "Christianity will be overcome by making men 'forget' everything which is at a tension with securing 'the commodities of life.' All that is required on the part of 'political writers' like Montesquieu is to show the way to an understanding of Christianity which is not in conflict with devotion to commerce and comfort; the inherent attractions of these things will do the rest."[61] And the Constitution of the United States certainly did nothing to discourage a life devoted to the acquisition of material comforts.

The Founders did not establish religion, but they did establish commerce and the commercial republic; by so doing, they facilitated the acquisition of the material comforts it would provide. In a statement whose significance cannot be overemphasized, Madison, in the most famous of the *Federalist Papers,* says that the "protection of different and unequal faculties of acquiring property...is the first object of government."[62] Previous generations, no less than our own, have regarded such a statement as outrageous. Many people have simply refused to concede that Madison meant what he said. It is too blunt for us, too shocking to our sensibilities, too seemingly lacking in a concern for the less well endowed or less fortunate, those who do not fare well in the competition. But this was not an ill-considered statement tossed off in the press of meeting a journalistic deadline; he had said essentially the same thing on the floor of the constitutional convention.[63] Commerce and the material comforts it promises will entice men away from their austere religions and, in addition, will provide the needed substitute for the moral habits religion inculcated. This was Locke's and, later and in more precise detail, Adam Smith's teaching,[64] but it was left to Madison to apply it to an actual political situation. This he did in the tenth *Federalist.*

The argument goes as follows: The United States, a nation founded on the principle of self-interest ("to secure these [individual] rights, governments are instituted among men"), faces the severe problem of somehow moderating self-interest. The problem will manifest itself—and in 1788 had already manifested itself in the various states—as the problem of faction, defined as "a number of citizens...united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." The "mischief" can be cured by removing its causes—but only at the price of liberty—or, the old religious way, by giving everyone the "same opinions, the same passions, and the same interests." For example, the state might require everyone to be an Anglo-Catholic, as Britain and, more recently, even Virginia had tried to do. Madison, speaking for the United States, rejects that "cure." Besides, the states were demonstrating that it was, in fact, a cure no longer available in America. "From the conclusion of this war," said Jefferson at the end of his discussion of religion, "we shall be going down hill [and] the people will forget themselves, but in the sole faculty of making money."[65] The states, despite their affirmations, were not succeeding in restraining this passion. Massachusetts may have required public support of public worship—because the preservation of civil government was thought, or said, to depend "upon piety, religion and morality"—but Massachusetts was the scene of Shays's Rebellion, and in the Founders' minds no event better illustrated the extent to which a democratic people could trample on the rights of man. There was, Madison argued on the floor of the constitutional convention, no security in the states for private rights and the steady dispensation of justice. "Interferences with these were evils which had more perhaps than anything else, produced this convention." In a republic the majority rules; when the majority is united by a common interest or passion, the rights of the minority are in danger. What, he asked, will restrain it? Not a "prudent regard to the maxim that honesty is the best policy"; not a "respect for character"; not "conscience"; not religion. Indeed, "religion itself may become a motive to persecution and oppression."[46] The states called for morality, but they had not succeeded in providing it. The states praised sumptuary laws, John Adams noted, but such laws were more often praised than enacted.[47] That was why an entirely different approach, an approach embodying a substitute for or a supplement to morality, had to be found.*

Fortunately, a substitute or supplement was available. The "mischief" could be cured by controlling the effects of faction: instead of attempting to make men moral by preaching to them to love their neighbors as themselves, which cannot be relied on to work in the United States ("we well know that neither moral nor religious motives can be relied on as an adequate control"), instead of trying to control the passions, especially acquisitiveness or greed, the state could direct the passions of men to the pursuit of material goods. It is in this context that Madison says that the "protection of different and unequal faculties of acquiring property... is the first object of government." There would be no unrestrained majority operating within each state and riding roughshod over the rights of others, since a large commercial republic like that delineated in the tenth *Federalist* would make the formation of such a majority extremely difficult. And instead of civil strife and wars caused by disputes between Catholics and Protestants, Christians and Jews, or high church or low church, men could live in peace and liberty if permitted to pursue successfully their passion for material well-being (and they would succeed, and have succeeded) in the large commercial republic dedicated to promoting "different degrees and kinds of property."[68] In short, instead of pursuing eternal salvation and fighting over how to achieve it, if men seek material gratification and win it, republican government will be possible. We know the result under the name of capitalism. Capitalism, understood as the right of unlimited acquisition, will promote the "Wealth of Nations" and, by so doing, secure the rights of man. This is what it means to say that acquisition is the substitute for morality—or, to speak more soberly, was intended to be a substitute for morality.

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*This issue of the republic founded on public spirit and virtuous citizens or the republic founded on self-interest and the commercial spirit was the issue debated in the ratification struggle, with the Antifederalists contending for the former and the Federalists for the latter. The Antifederalists, of course, lost the debate, which proved to be decisive for the subsequent history of the country.

Conclusion

Liberalism knows nothing about happiness; indeed, according to the "laws of nature and Nature's God," the only knowledge of this available to man is knowledge of the conditions appropriate to the pursuit of what each man may call happiness. It follows from this that there can be no official answer to the most important question: How shall I live? The role of the properly constituted government is therefore confined to guaranteeing the conditions that allow each man to pursue his privately defined happiness. Liberalism preserves the private sphere and fosters the self-defined private life. Stated within the terms of the First Amendment, the United States may not establish any church or recognize any creed or any articles of faith, but it must protect the rights of conscience, or the right of every man to believe what he will. These "operations of the mind," as Jefferson put it, unlike "the acts of the body," are not "subject to coercion of the laws." Thus was religion subordinated through relegation to the private realm, where everyone is free to believe there is one god or twenty gods or no god at all.

But the acts performed by the body are not independent of the operations of the mind, so that even the truest of liberal governments may not be able to remain indifferent to this private realm where opinions are formed. As early as 1781, Jefferson was wondering whether American liberty did not depend on the "conviction in the minds of the people" that it was the gift of God; and after only eight years of government under the Constitution, Washington warned the nation that religion provided the "indispensable" support of those "dispositions and habits which lead to political prosperity." Then, on the eve of his death, Jefferson again said that he rejoiced "that in this blessed country of free inquiry and belief, which has surrendered its creed and conscience to neither kings nor priests, the genuine doctrine of one god only is reviving, and [he hoped] that there [was] not a *young man* [then] living in the United States who [would] not die an Unitarian."[69] It was still a private matter whether a man said there is one god or twenty gods or no god, but Jefferson was himself of the opinion that it would be politically beneficial if Americans privately were to decide that there is "only one God, and he all perfect," that "there is a future state of rewards and punishments," and that everyone should "love God with all [his] heart and [his] neighbor as [himself]."[70]

Liberal government protected the private realm, but there seems to have been an awareness that the health of liberal government required certain virtuous habits to be preserved in that realm. Stated otherwise, liberalism required both the subordination of religion and the maintenance of certain habits that religion alone could inculcate. This is why the First Congress, in drawing up the First Amendment, protected the right to be religious and, in forbidding laws respecting an establishment of religion, was careful to avoid language that would also forbid aid, including financial aid, to religion on a nondiscriminatory basis. Thus, Justice Douglas was right when he complained—even if from the point of view of the authors of the First Amendment he was wrong *to* complain—that our "system at the federal and state levels is honeycombed with such financing."[71] In God (reasonably defined) we do indeed collectively trust, and there is even room for those who trust in Him first and foremost, provided their piety stays within the bounds required for "peace and good order." Until those bounds are violated, Jefferson said, it is unnecessary for "the State to be troubled with [them]."[72]

Americans had, as Tocqueville observed, succeeded in combining the spirit of religion and the spirit of liberty, but they did so by subordinating the former to the latter. Not only were they wise to do so, he suggested, but the two could not be combined in any other fashion.[73] Still, if he was right, "the whole nation" held religion "to be indispensable to the maintenance of republican institutions,"[74] and it was his opinion that only so long as this combination was maintained would the crisis of liberalism be avoided. The First Amendment question of our own day is whether the Supreme Court will permit the means of maintaining both religion and liberty.

Senator HATCH. Our next witness is Prof. Burke Marshall of the Yale Law School. He is the former Assistant Attorney General for Civil Rights and one of the most distinguished constitutional scholars in the country.

STATEMENT OF BURKE MARSHALL, PROFESSOR, SCHOOL OF LAW, YALE UNIVERSITY

Mr. MARSHALL. Thank you, Mr. Chairman.

I have a very brief statement, and I will read most of it into the record.

Senator HATCH. That will be fine.

Mr. MARSHALL. My name is Burke Marshall. I am the John Thomas Smith Professor of Law at the Yale Law School in New Haven, CT. I teach courses on the Constitution and constitutional litigation and have for several years taught a course at the law school concerned specifically with the first amendment, including the establishment and free-exercise clauses.

My testimony is for myself. I do not speak for the Yale Law School or for any group.

Let me state at the outset that I construe the language of Senate Joint Resolution 73 to contemplate the use in schools of prayers written or at least chosen by school boards or other instrumentalities of the State, in the context of the regular program of the school involved, with the proviso that no person shall be required to participate in prayer.

In other words, I take the thrust of the amendment to be to overrule *Engel* v. *Vitale* and *Abington Township School* v. *Schempp,* as well as the many subsequent decisions implementing the constitutional policy applied in those cases.

If I am wrong about the meaning of the proposed amendment, then the force of my objections to it would be diminished.

The core objection to the resolution is that it inescapably leaves the matter of the choice of the prayer or prayers to be offered as part of a school program up to the agents of the State.

Who else but members of the school board or other officials of the State will write the prayer, as in *Engel*? Who else but those officials of government can mediate among religious groups competing on political turf to have their religious faith represented by their prayer and not someone else's? Yet, what school board or school superintendant or parent-teachers association or legislature has the wisdom and knowledge to penetrate through religious beliefs and discover the eternal verities?

It was to keep government and government officials out of the business of making such choices that the people asked to ratify the Constitution insisted on the inclusion of the establishment and free-exercise clauses in the first amendment as a condition of their approval. They realized that the making of any such choices by government is a step of extraordinarily important symbolism, even if an apparently minor one, in the direction of putting an official stamp of approval on some particular form of religious belief, as against all other conceivable alternatives.

There should be no doubt that it would be perceived as such by those whom the proposed amendment is intended to benefit most, those who believe most deeply in their faith, and who take the teachings and tenets of their religion most seriously.

Those who support the proposed amendment no doubt believe that it is the prayer of their faith that will prevail with the government decisionmakers in their community. But that is a false hope. Religious majorities are transitory in any given place, and it was their knowledge of the history of shifts in political decisions about religion and the resulting divisiveness, anguish, and strife among competing faiths, coupled with periodic suppression of some of them, that led Congress to propose and the States to adopt the first amendment almost 200 years ago.

Further, it must be remembered that the particular prayer adopted must always under the proposed amendment be the prayer of the State, not of some particular church, even if borrowed from a church for awhile, because the decision to use that prayer is that of the State or its delegates, not of the church.

The only alternative to the adoption of prayers of a particular faith were the resolution to become part of the Constitution, would be an effort by State officials to provide a prayer of their own, as in the *Engel* case, that is so bland that it offends no religion by attempting to find common ground among them all.

That result, which might well happen from time to time and place to place, is not an exultation of religious belief, however, but a bland trivialization of a ceremony that is supposed to express personal faith.

It is, in short, not hostility to religion, but deep respect for it and for the depths of the faiths held by the diverse religious organizations in this country that is at the heart of the establishment clause as well as the free exercise clause and is the fundamental reason for opposing the invitation in the resolution to government intrusion into religious beliefs.

Finally, let me add a word about the second sentence of the resolution, which states that, "No person shall be required by the United States or by any state to participate in prayer."

Senator HATCH. Thank you, Professor Marshall. Professor Cord and Dr. Malbin have both testified before this committee that the earliest Congresses, those presumably which best understood the intent and the meaning of the first amendment, engaged in a variety of activities designed to encourage religion generally.

These activities, they say, included such things as providing construction assistance to churches, encouraging religious teachings among the Indians, creating various public chaplaincies, and so forth.

What is the constitutional significance of this history, in your opinion?

Mr. MARSHALL. Senator, I have no doubt that the founders as well as the present day political leaders of this country do not want to discriminate against religion. And they want to encourage the diversity of religious faiths in the country. The trouble with the prayer amendment is that it puts the state in the business of deciding religious beliefs and in the business of establishing compulsory religious beliefs.

As the the Court said in *Engel,* I think that Dr. Malbin just testified, that *Engel,* especially, was completely consistent with what is at the heart of the establishment clause. And the—what the Court said in *Engel* was that the establishment clause has a central meaning. It is that the Government should not be in this business of writing prayers, which they did in *Engel*, or of choosing among and adopting a prayer that was written by some church.

Now, that is the inescapable consequence of the resolution, as I understand it.

Senator HATCH. Did the drafters of the 14th amendment, in your view, intend to alter in any way the establishment clause? Furthermore, what is the significance of the so-called Blaine amendment of 1876 in understanding the intent of the 14th amendment?

As you will recall, Professor Malbin said that if the authors of the 14th amendment thought that it was going to negatively impact state encouragement of religion, Blaine would not have offered his own famous amendment, which passed the House and failed in the Senate in 1876 and read as follows: "No state shall make any law respecting an establishment of religion or prohibiting the free exercise thereof."

So, again, did the drafters of the 14th amendment, in your view, intend to in any way, alter the scope of the establishment clause?

Mr. MARSHALL. Senator, as you know, there is a long judicial history with respect to the degree to which the 14th amendment imposes on the States the constraints of the Bill of Rights, including the establishment clause. That history is, I think, well founded. It is consistent with part of the history of the passage of the 14th amendment and probably inconsistent with other pieces of that history.

It is almost impossible with respect to this question and with respect to any other question having to do with the imposition of the constraints of the Bill of Rights on the States to decide that one way or another from the reading of the historical record.

The Supreme Court tried that at great length, setting it down for reargument in the case of the *Brown* decision, for example.

Senator HATCH. Would you respond to my suggestion that the issue here is not simply school prayer, but how constitutional policy is going to be altered in this country. For example, did the Court in *Abington* and *Engel* transform the existing constitutional understanding with respect to school prayer?

Mr. MARSHALL. Not in my judgment, Senator.

Senator HATCH. In spite of the research by Professors Cord and Malbin?

Mr. MARSHALL. I did not hear Professor Malbin to say anything inconsistent with that.

Senator HATCH. And yet for 175 years thousands of school communities had school prayer?

Mr. MARSHALL. The matter had not come up to the Supreme Court, Senator. The Supreme Court is in the position in our system of having to determine what the Constitution means when a case properly comes before it that raises the question of whether or not what a State is doing is constitutionally prohibited.

And that case—that question came before them basically for the first time in *Engel* v. *Vitale*. There were some previous indications, including the flag salute cases that I think predicted the outcome of *Engel* v. *Vitale and Abington.*

Senator HATCH. How would you respond to Dr. Malbin's analysis that the intent of the first amendment was to ensure that the Government would not give preferential treatment to individual orders or denominations, not that it would be neutral toward religion?

Mr. MARSHALL. Senator, Dr. Malbin knows much more than I do about the original intent of the framers, but as I heard his testimony, and as I understand the history of the clause, that was a part of it; the other part of it was that they did not want the Government to get into the position of having to choose among religions. That may have been implicit in what you just said. And the business of deciding what prayer it is that will be said in the context of compulsory school education, necessarily puts the Government in that kind of a position.

That is my central objection to this amendment.

Senator HATCH. Do you believe that a moment of silent prayer would be consistent with the Constitution?

Mr. MARSHALL. Senator, may I say that the amendment is not limited in that way at all.

Senator HATCH. I understand, but suppose we were considering a measure that allowed for a moment of silent prayer. Would this be consistent with the Constitution as you are interpreting it?

Mr. MARSHALL. Well, as Dr. Malbin said, even silent prayer, if it is prayer in a Christian context, is choosing among religious faiths. And simply the use of the word "prayer" and the compulsion of or the use of the compulsory school educational system to engage in that practice has, I think, not nearly the same degree of intrusiveness as the amendment is written.

But even that, I think, is bad policy; there is, as you know, a case that tests the constitutionality of a moment of silent prayer now under the establishment clause. And I am sure that that is an issue that will be decided by the Supreme Court in the next year or so.

Senator HATCH. Perhaps we could say silent prayer and/or meditation. In any event, those who are unhappy about the present law complain that five justices on the Supreme Court in essence amended the Constitution when they determined this issue after 175 years of prayer in school. As a result, they say, religion and any observance thereof have basically been thrown out of the schools.

What we are trying to do on this committee is come up with a proposal that will be acceptable constitutionally as well as acceptable to those offended by the idea of a set prayer or a vocal prayer or any other treatment which seems to favor a certain religious tradition. It is also important that we provide for equal access to the believer and nonbeliever alike.

Do you feel that that is a worthless exercise, or do you feel that that is just something that should not be done?

Mr. MARSHALL. Senator, my testimony and my objection is to Senate Joint Resolution 73——

Senator HATCH. The administration's proposal.

Mr. MARSHALL. The administration's proposal.

Senator HATCH. So you might feel differently about a better proposal that dealt with the concerns you have expressed today?

Mr. MARSHALL. Well, I would not predict, Senator, but it might be less intense.

Senator HATCH. OK. [Laughter.]

Well, we are going to try and do that. We have appreciated your testimony here today. I do recognize you as one of the leading authorities in the country in the field of constitutional law. So, we are grateful for you taking this time to be with us.

Mr. MARSHALL. Thank you, Senator.

Senator HATCH. Thank you so much.

Senator GRASSLEY. Mr. Chairman?

Senator HATCH. Oh, excuse me, Senator Grassley.

Senator GRASSLEY. Just before you started to ask your first question, Mr. Marshall started to comment on the second sentence of the amendment, and I would like to hear what you were going to say about that.

Mr. MARSHALL. I will not read my statement on it, Senator, but basically the significance of the second sentence is unclear to me. And at the least, it would lead to an enormous amount of litigation over what "require" means, which is the verb in the second setence, and what "participates" means, because I think that it is indisputable that under almost any program that you can think of, especially for primary school children, that there is a coercive effect that is on them simply by the adoption of this kind of a prayer program by the school, even though the school makes provision that they can opt out of it.

Dr. Malbin in his testimony listed a number of hypotheticals, what if the school board did this, what if the school board did that?

Each of those hypotheticals, as I listened to him, sounded to me like a lawsuit, and that the lawsuit would simply re-litigate the questions of the degree of coercive effect, which no one wants, of devices such as the released time device or the standing silently without praying, or whatever other devices are—may be used to try to escape that coercive effect.

I think, Senator, it is very difficult to escape it. And if the second sentence of the resolution means that the courts are not to go into the question of indirect coercive effect, then I think it is a very bad amendment. If it is not intended to do that, but to permit the courts to judge the indirect coercive effects on schoolchildren of prayer programs, then I think the amendment would, as I say, lead to decades of litigation.

Senator HATCH. Thank you, Senator Grassley. Thank you, Professor Marshall. We appreciate having you here.

The last six witnesses will testify in two panels. So we will call at this time the Rev. Robert P. Dugan, Jr., of the National Association of Evangelicals; Mr. Dick Dingman of the Moral Majority; and Mr. Gary Jarmin, the executive director of Christian Voice. And then we will hear from the second panel.

The reason that we will do this in panels is because basically these are organizational witnesses, and I think we can probably have a more lively discussion this way.

We also have Mr. Forest Montgomery with the NAE. We are happy to have you with us as well.

We will begin with you, Reverend Dugan. If you could limit your remarks to a summarization of about 5 minutes, we will have more time for questions.

STATEMENTS OF ROBERT P. DUGAN, JR., NATIONAL ASSOCIATION OF EVANGELICALS, ACCOMPANIED BY FOREST MONTGOMERY, COUNSEL, OFFICE OF PUBLIC AFFAIRS; RICHARD DINGMAN, THE MORAL MAJORITY; AND GARY L. JARMIN, EXECUTIVE DIRECTOR, CHRISTIAN VOICE

Mr. DUGAN. Mr. Chairman and members of the committee, the National Association of Evangelicals appreciates this opportunity to contribute our thoughts to the school prayer dialog. We want to acknowledge with gratitude the continuing support of the President who recognizes the need to address a problem the country has been wrestling with off and on for some two decades.

The school prayer controversy is not going to evaporate. It will remain as long as millions of Americans, of many different faiths, want to see some acknowledgement of God returned to our public schools.

Many of the values we treasure are passed down from generation to generation in our public schools where 90 percent of future Americans acquire a basic education and an understanding of the society in which we live. Those must not be exclusively secular values. We are here today not so much to urge specific relief, though we do have some thoughts in that area, but to urge this committee and the Congress to come to grips with this school prayer controversy.

Surely men and women of good will can agree that the first amendment to the Constitution does not bar governmental efforts to accommodate free speech and the free exercise of religion. From that basic premise, Congress should be able to formulate some relief that will be acceptable to the vast majority of Americans.

No measure, of course, is going to be acceptable to those who cry crocodile tears over what they characterize as an attack on the first amendment. They want the present warped establishment clause analysis, which is so much in fashion in the Federal courts, to be extended until every vestige of religious free speech is banned from the public school classroom.

Evangelicals are not the only ones becoming increasingly aware of the judge-made threat to the religious freedom of their children. Americans, 97 percent of whom profess some belief in God, are not going to acquiesce in the affront to religious liberty perpetrated by our Federal courts in the name of religious liberty.

In effect, the first amendment analysis proceeds along the following lines. Students enjoy constitutional rights like other Americans. But if they meet on the school grounds for religious purposes, there is necessarily a "symbolic inference" of State sponsorship. That symbolic inference, said the *Brandon* court, is "too dangerous to permit."

Therefore, students must be denied equal protection of the laws; they must be denied free speech; they must be denied free exercise of religion.

Unencumbered by the mental gymnastics and judicial hocus-pocus the courts have employed to reach such a patently absurd result; those Americans familiar with cases such as *Brandon* and *Lubbock* are demanding action to end repression of the religious liberty of their children. You may think I have been too critical of the courts, so let me explain why the criticisms, in my view, are fully justified:

(1) The establishment clause was originally intended to serve two basic functions. First, to prevent the establishment of a national religion. Second, to prevent Congress from interferring with those States which had established churches of their own. See, generally, Michael Malbin's book, "Religion and Politics: The Intentions of the Authors of the First Amendment." That clause was intended to secure religious liberty, not to be an instrument to suppress religious free speech.

(2) The courts in such cases as *Brandon* and *Lubbock* have dismally failed to distinguish between State-composed prayer and State-sponsored religious devotions and student-initiated and student-sponsored religious activity. However, those impressionable young high school students who are studying foreign languages, conducting laboratory experiments, writing essays, and so forth, are considered fully capable of distinguishing between activities the school sponsors and extracurricular activities the students initiate on their own.

(3) The courts in both *Brandon* and *Lubbock* rely on Harvard Professor of Law, Lawrence H. Tribe's constitutional law treatise in support of their decisions. But on April 11, 1983, Professor Tribe wrote a letter to the Senate Judiciary Committee, for inclusion in the record, indicating that the decisions in *Brandon* and *Lubbock* were wrong as a matter of law.

Senate Joint Resolution 73 would constructively amend the Constitution. The President's amendment steers a wise course by not conferring an affirmative right to prayer in the public schools. It would simply remove any constitutional obstacle to voluntary prayer.

The President's proposed amendment recognizes the need to return to the original meaning of the first amendment by restoring a balance between the establishment and free exercise clauses. Those clauses—in tandem—were meant to secure the blessings of religious liberty. Obviously, neither was meant to subordinate the other, our Federal courts to the contrary notwithstanding.

Since this proposed amendment was first considered last July, the Supreme Court has declined to review the Lubbock case despite an amicus curiae brief filed on behalf of Senator Mark Hatfield and 23 of his colleagues.

Senator Denton and Senator Hatfield have since introduced "equal access" bills—and I am delighted at last week's hearings on those—which would recognize the right of students to meet for religious purposes on the public school campus during noninstructional periods on the same basis as other student groups.

In light of these developments, we suggest some consideration be given to incorporating an equal access element in the proposed constitutional amendment.

In testifying on July 28, 1982, we expressed before the full committee our adverse view of government influence on the form or content of any prayer or other religious activity. Senator Hatfield's bill, S. 815, specifically addresses that concern in section 4. Our concern remains for the reasons I discussed at that time.

Sadly, there are those who would turn their back on the God who has blessed us richly. There are those who ardently want America's public schools to be wholly secular as a vital step to the secularization of all our institutions. The Constitution is a secular document, but it does not follow that America was founded as a secular nation. Indeed, its charter of freedom repeatedly acknowledges the blessings of divine providence. Our Founding Fathers did not ignore God, nor should we.

Have we become so divided as a people that we cannot respect the beliefs of others? Can we not freely acknowledge our religious pluralism? Cannot religious pluralism be preserved without leaping to a godless solution? Must we continue to instill in future generations of Americans the idea that something is so wrong with religious speech that it is not entitled to the protection afforded all other forms of speech? As the dissenting judges pointedly asked in the Lubbock case. "Is neutrality still the objective or is it the fashion now to make the state the adversary of religious belief?"

In the *Walz* case, Chief Justice Burger, speaking for the Court, said, "There is room for play in the joints of the First Amendment, productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." But government neutrality today is a myth. The students in *Brandon* stated that they were not seeking faculty supervision or other government involvement. They sought not sponsorship; they asked only to meet undisturbed.

We see in the decisions of our Federal courts a callous indifference to religion, notwithstanding the hollow rhetoric about our treasured religious liberty. When there is a usurpation of power, we the people, who established the Constitution, have the right and the responsibility to act to restore the status quo. You represent us. We respectfully ask you to act and act now to end the present suppression of religious liberty. America's rich religious heritage must be preserved.

Senator HATCH. Well, thank you, Reverend Dugan. I just realized that, I forgot to appropriately introduce the three of you.

The Reverend Robert P. Dugan, Jr., who just addressed us this afternoon, represents the National Association of Evangelicals. I might add, Reverend Dugan, I believe you delivered an extremely thoughtful piece of testimony when you appeared on this matter during the 97th Congress. As I understand it, you are an ordained Baptist minister, and you have served as president of the Conservative Baptist Association of America and chaplain of the State of Colorado.

Mr. DUGAN. The State senate there, Senator, yes.

Senator HATCH. The State senate there. We are very happy to have listened to your testimony.

Our next witness will be Richard Dingman, who is the legislative director of the Moral Majority. Mr. Dingman was for many years the director of the House Republican Study Committee and before that worked for several members of the House of Representatives.

The witness after Mr. Dingman will be Gary Jarmin, who is the executive director of Christian Voice, a conservative public interest organization. Gary is also the current chairman of Project Prayer. I am sorry that I did not introduce you all before you began. Please go ahead, Mr. Dingman.

STATEMENT OF RICHARD DINGMAN

Mr. DINGMAN. Thank you, Mr. Chairman.

I would like to commend the committee for their quick action on this amendment. As a former town councilman in nearby Virginia and as the former executive director of the House Republican Study Committee, I have had many opportunities to review the concept of voluntary school prayer.

Now, as the legislative director of the Moral Majority, I wish to endorse this legislation on behalf of over 4.5 million members nationwide.

The issue of voluntary school prayer is certainly not a new concept to the American public. Americans overwhelmingly support voluntary prayer in public schools. Nearly every public opinion poll compiled on the issue gives credence to this statement. We have had earlier reference this morning to a number of these polls.

For example, a June 10, 1982 Gallup poll asked the question, "Do you favor or oppose the President's voluntary school prayer amendment?" Of those polled, 79 percent were in favor, 5 percent had no opinion and only 16 percent said they opposed the amendment. An NBC/AP poll on May 24, 1982, indicated that two-thirds of the public favor enactment of an amendment to permit organized prayer in public schools. On may 6, 1982, a CBS/New York times poll said that rank and file Democrats support school prayer at least as strongly as Republicans, 74 percent of Democrats were in favor as compared to 73 percent of Rebublicans. According to a March 10, 1982, ABC/Washington Post poll, elderly individuals, over the age of 62, favored school prayer by a margin of 77 percent. Finally according to an October 4, 1981, Los Angeles Times poll, women approved of school prayer even more strongly than men by a margin of 81 percent to 73 percent.

Suffice it to say that those done by secular organizations, news media, et cetera, have typically shown support in the range of about 80 percent for school prayer.

The fact of the matter is that a great deal of public support exists for voluntary school prayer. As a former congressional staff member for over 12 years, I speak from experience in saying that support for prayer in public schools has been constant over the years. I frankly cannot help but ask how long can the Congress continue to refuse public demands for voluntary school prayer.

Religious values, principles, and practice have always been a vital aspect of American public education. Since their beginning, public schools have included some form of prayer, and for over 170 years after the adoption of the first amendment, public prayers were not only permitted, but were encouraged within the public school system.

Horace Mann, who is generally credited with being the father of modern public education in America is a notable example of the importance of religious tradition in public education. Mann served as the secretary of the Massachusetts Board of Education, and under his direction a mandated program of daily Bible reading and devotional exercises was implemented statewide.

Mann said that he was in favor of religious instruction, "to the extremest verge to which it can be carried without invading those rights of conscience which are established by the laws of God and guaranteed to us by the Constitution."

I wholeheartedly agree with Mann's statement that a careful balance must be reached between allowing religious expression and protecting the rights of those individuals not wanting to participate. And I believe Senate Joint Resolution 73 addresses this problem adequately.

Even Thomas Jefferson, who was often quoted by the late Supreme Court Justice Hugo Black on the "absolute wall of separation between church and state," advocated a relationship between religion and education. In his plan for the University of Virgnia, Jefferson proposed a professorship in ethics, the duties of which included teaching proofs of the existence of God.

Furthermore, Jefferson set aside a room in the rotunda of the University for prayer and meditation. It was a clear demonstration of his viewpoint in this matter. Jefferson proposed that students at nearby religious seminaries be given the privilege of using university facilities, a freedom which religious students today are no longer entitled to enjoy. Jefferson's plan combined the exercise of religion and public education in a way that contradicts current interpretation of the Supreme Court's decision on school prayer in the 1960's.

President Reagan may have best described the problem of Supreme Court misinterpretations of the Constitution at last year's national day of prayer on May 6 when he said:

> The morality and values such faith implies are deeply embedded in our national character. Our country embraces those principles by design, and we abandon them at our peril.
>
> Yet in recent years, well meaning Americans in the name of freedom have taken freedom away. For the sake of religious tolerance, they have forbidden religious practice in our public classrooms. The law of this land has effectively removed prayer from our classrooms.
>
> Thomas Jefferson once said, "Almighty God created the mind free", but current interpretation of our Constitution holds that minds of our children cannot be free to pray to God in our public schools. No one will ever convince me that a moment of voluntary prayer will harm a child or threaten a school or State. But I think it can strengthen our faith in a creator who alone has the power to bless America.

I believe it is the responsibility of this committee under the auspices of the governmental checks and balances to correct this current distortion of the Constitution.

The founders of our Nation and the framers of the first amendment did not intend to preclude prayer from our public schools and institutions. Nearly every President since Washington has proclaimed a day of public prayer and thanksgiving to acknowledge the favors of Almighty God. We have recognized God's existence in our coinage, our national anthem, Pledge of Allegiance, and the Supreme Court in 1952 stated, "We are a religious people whose institutions presuppose a supreme being."

Sessions of Congress and the many State legislatures open with prayer. Each of the branches of the military maintains chaplains and maintains chapels and hymn books for use by servicemen and women. The President, as well as Governors and mayors of many of our States and cities, preside over annual prayer breakfasts.

The President-elect takes the oath of office with his hand on the Bible. The standard for oaths, sworn testimony in the U.S. courts contains the phrase, "so help me God." And each new session of the Supreme Court opens with the declaration, "God save the United States and this honorable Court."

By banning school prayer, the Supreme Court was not only out of step with the original intentions and traditions of our Founding Fathers, but was actually promoting a new, official line by saying that voluntary expression of religious belief was unacceptable and illegal. In these decisions, the Court placed school prayer on the same level as stealing or drinking or using illicit drugs on public school grounds, all of which are forbidden activities.

Under these circumstances, a constitutional amendment is needed to reaffirm America's heritage of allowing those who wish to express their religious beliefs while simultaneously safeguarding the freedom of those who do not wish to participate.

Opponents of voluntary school prayer amendment contend that there is no method for preventing school districts from imposing religion on their students; this argument is completely unfounded. The amendment possesses two major qualities, which protect against the imposition of sectarian belief. First, American tradition is one of respect for diversity and for freedom of religious expression.

I am aware of no historical or statistical evidence to prove that any State has ever imposed a religious doctrine through a school prayer that rendered schoolchildren emotionally or psychologically disturbed. The fact of the matter is that local school districts have rarely ever sought to stifle diversity or to offend those who hold minority religious views.

Second, the amendment absolutely forbids public schools from requiring anyone to participate in any prayer or religious exercise. The student's right to refuse to participate will serve as an absolute safeguard against the imposition of school prayers.

In conclusion, the arguments that I have presented today are not new. We have been discussing this issue for over 20 years. Now heavy laden with hypotheticals and technicalities, during those 20 years while God has been expelled from school, we have seen a major breakdown in classroom discipline, a major rise in classroom assaults; possibly, just possibly, beginning the day in an atmosphere of reverence and serious reflection would help restore classroom civility. Other measures have largely failed, and it is certainly worth a try.

I would recall to your attention that the bottom line is that the American people want voluntary prayer returned. They feel it is proper and necessary. I believe that for every person distraught over returning prayer to the classroom, many would be delighted.

The polls bear record of this fact, and I believe it is time that the representatives of the people bring their views into line with the public demand and historical precedent.

Mr. Chairman, I would suggest to you that a publication that was put out by the Republican Study Committee last year—it was not written by me so I can praise it as a good piece—but I would urge that you consider including this as part of the record. It has some very fine historical work done in it. And if I may take just one other second——

Senator HATCH. Without objection, we will place that in the record.

Mr. DINGMAN. Thank you, sir.

If I may, just one or two other comments that are really in response to a couple of things that were said earlier today. There seems to be a lot of concern about those who might object to prayer and the peer pressure that it would put on students. I would submit to you that during much of the debate in recent years over such things as sex education, the solution that the proponents have always come up with was that of excusing those who choose not to participate.

And I find it rather paradoxical that when it comes to school prayer that that is not an adequate solution, but it is on such other matters as sex education. And certainly, we are in a pluralistic society, and we cannot have a value-free educational system.

I recall when I moved from the northern part of this country to the southern part during my elementary school years, that somehow there was a slightly different twist on the outcome of the Civil War when I got in the South than there was in the North.

And I think that reflects a bias in the teachers and certainly you cannot expect that all teaching is going to be value free, nor would we want it to be. We also find the same problem in the matter of creation versus evolution. And I note that the people who are for the evolution theory alone feel that creation is a religious doctrine and therefore should not be taught.

But they refuse to agree that by taking the evolution theory alone, that that is hostility toward religion and it is antithetical.

So I would suggest to you that there seem to be many paradoxes in the arguments being presented by those who oppose school prayer.

Thank you, Mr. Chairman.

Senator HATCH. Thank you, Mr. Dingman.

[The following was received for the record:]

Republican
Study
Committee

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October 8, 1982

BACKGROUNDER

PRESIDENT REAGAN'S PROPOSED VOLUNTARY SCHOOL PRAYER AMENDMENT

SCOPE: This Backgrounder will examine:

a) the President's proposed amendment; and
b) related background issues.

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I. Status

On May 17, President Reagan sent to the Congress for consideration proposed language for a Constitutional amendment to restore voluntary prayer in public shcools. It was introduced in the House by Rep. Tom Kindness on May 25 as H.J. Res. 493, referred to the House Judiciary Committee on May 25, and to the Subcommittee on Civil and Constitutional Rights on May 27. No hearings have been scheduled. Currently there are 50 co-sponsors. It was introduced in the Senate by Sen. Strom Thurmond on May 18 as S.J. Res. 199. Currently there are six co-sponsors. It was referred to the Senate Judiciary Committee on May 18, which held hearings on July 29, August 18 and September 16.

Despite enormous popular support for voluntary school prayer by rank-and-file Democrats as well as Republicans across the country, the Democratic House leadership has bottled up this bill in committee to avoid the embarrassment of roll call

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votes before an election. According to The Washington Post "[House Judiciary] Committee leaders ... acknowledge that most of these [social] measures will never see light of day unless extraordinary procedural means are used to pry them loose. ... [Don] Edwards is also deliberating over whether to hold hearings on a constitutional amendment the Reagan administration plans to submit to allow prayer in public schools. 'That's a tough one,' he said. 'It's so popular with the American people. And how do you vote against God?'"[1]

Rep. Kindness is gathering signatures for Discharge Petition #20, to bring the proposal to the full House during this 97th Congress.

II. The Need to Correct the Court's Interpretations

This amendment would, in effect, reverse the Supreme Court's misinterpretations of the First Amendment in 1962 and 1963, which created a federal prohibition against voluntary prayer in public schools. The amendment would thereby:

- End the demotion of the right to pray to a second class right;
- Stop the harassment and discrimination against students who are forbidden from exercising religious free speech while fellow students freely exercise other forms of free speech. Under current rulings, they are treated as second class citizens;
- Return authority over school prayer to state and local authorities, from an imperial federal judiciary which has made itself a *de facto* national school board;
- Restore a sensible balance between the rights of willing students to pray and objecting students not to pray;
- Reverse what Justice Stewart called "the establishment of a religion of secularism" in public schools;
- Reassert America's heritage as a nation "under God;"
- Redirect the federal government from inhibiting to safeguarding the Constitutionally guaranteed exercise of religion; and
- Respect the public opinion of the vast majority of Americans of every region and party affiliation.

While Congress is considering this amendment as a permanent solution to the Supreme Court's rulings, it need not preclude other legislative remedies, such as statutes to restrict federal court jurisdiction over school prayer cases. Passage of an amendment should not be necessary to make the Constitution say what its authors meant in the first place. It is ironic that supporters of school prayer should have to fight the torturous amending process, made difficult by design of the Framers, merely to reconform the Constitution to those Framers' intent. In simple fairness, it is the opponents of school prayer -- not the supporters -- who should have had to accomplish their revision of the Constitution by the established democratic process. Instead, they have taken the shortcut of changing the Constitution by edict of simple majority votes of nine unelected men on the Supreme Court.

III. The Loss of Religious Freedom Under Current Rulings

In *Engel v. Vitale* (1962),[2] the Supreme Court ruled unconstitutional the voluntary recitation of a 22-word non-sectarian, state-composed prayer in public schools. In *Abingdon School District v. Schempp* and *Murray v. Curlette* (1963),[3] the Court declared unconstitutional the reading of verses from the Bible (unaccompanied by comment) and recitation of the Lord's Prayer.

Since these landmark rulings, courts and school administrators have progressively eroded the right to religious expression in the schools -- and elsewhere in public life as well. For example:

- **Student-initiated, voluntary prayer meetings by a high school group called "Students for Voluntary Prayer" was banned by a board of education in New York. Federal Judge Irving R. Kaufman of the 2nd Circuit Court of appeals upheld the ban.**[4]

The banned student group sought to meet in a class room immediately before school, without supervision or faculty involvement, and stated that its activities were voluntary and would not conflict with other school functions. Although the Supreme Court has ruled that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[5] Judge Kaufman vigorously upheld the disciminatory ban on the right of the students to exercise their religious free exercise and free speech rights. Moreover, he did so in language which underscored the *double standard* and *second class treatment* that exists *for students who wish to pray*. "*While students have First Amendment rights to political speech* in public schools," the judge declared, "*sensitive Establishment Clause considerations limit their right to air religious doctrines*." (Emphasis added.) "Equally compelling, the students in this case proposed to conduct *prayer* meetings ..." (Emphasis in original.)[6]

Judge Kaufamn's opinion implied that no religious activity whatsoever is permissible in public schools:

> To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit.... An adolescent may perceive "voluntary" school prayer in a different light if he were to see the captain of the school's football team, the student body president, or the leading actress in a dramatic production participating in communal prayer meetings in the "captive audience" setting of a school.... Misconceptions over the appropriate roles of church and state learned during one's school years may never be corrected.[7]

As the Christian Legal Society observes, "This language would logically lead school officials to prevent students from bowing their heads before lunch, carrying their Bibles to school, or doing any other overt religious act of free exercise within the boundaries of the school."[8]

Judge Kaufman's expression of anxiety for the plight of an "impressionable" high school student suffering the potential fate of possible irreversible "misconceptions" as a consequence of attending school where other students merely meet for prayer before classes begin, is curiously lacking from another ruling in which he decided in favor of a high school teacher who had been discharged for wearing a black armband to protest the Vietnam war.[9] Unlike the vulnerable adolescents depicted in the *Brandon* decision who (the judge said) were impermissibly endangered by other students, these students were held not to be endangered. In this case, it was a teacher -- an authority figure, employed by the government -- who was expressing his beliefs. Further, the teacher engaged in this provocative activity during (rather than before) classroom periods, in front of a truly "captive audience." Yet, in this case, Judge Kaufman found the teacher's behavior "did not disrupt classroom activities" or "have any influence on any students."[10]

In another case, also involving a teacher expressing beliefs in a captive classroom setting,[11] the same judge said 14-16 year old 10th grade high school students were "young men and women" sufficiently mature to tolerate the expression of belief by a homeroom teacher:

> Young men and women at this stage of development are approaching an age when they form their own judgments. They readily perceive the existence of conflicts in the world around them; indeed, unless we are to screen them from all newspapers and television, it will be only a rather isolated teenager who does not have some understanding of the political divisions that exist and have existed in this country. Nor is this knowledge something to be dreaded. As we said in James: "Schools must play a central role in preparing their students to think and analyze and to recognize the demagogue."[12]

* **A school district that wanted to allow students the same freedom for religious expression as for other expression was frustrated by a federal court. The Lubbock, Texas school district established a policy to allow students to gather at the school before or after the regular school day, for any educational, moral, religious, or ethical purposes, so long as attendance was voluntary. This policy of nondiscrimination was ruled an unconstitutional establishement of religion by the 5th Circuit Court of Appeals, even though the avowed purpose of the policy was secular.[13]**

* **The reading of prayers from the Congressional Record to a voluntary gathering of students in a high school gymnasium before the beginning of the school day was forbidden by New Jersey state courts. The Supreme Court declined review. The school had considered the practice a "period for the free exercise of religion."[14]**

* **An Arizona school district's policy granting the high school student council permission to open optional school assemblies with voluntary, student-initiated prayer, unsupervised by teachers, was held a violation of the Establishment Clause by federal courts.[15]**

* **A school principal in New York ordered his teachers to stop kindergarten children from voluntarily saying grace before meals on their own initiative. The 2nd Circuit Court of Appeals upheld the ban.[16]**

* **Recitation by kindergarten children in Illinois of a thankful-type secular verse before meals, without reference to God, was held to violate the Establishment Clause by the 7th Circuit Court of Appeals.[17]**

* **A school board policy in Louisiana allowing students to participate in a one-minute prayer or meditation at the start of the school day, upon request and accompanied by parental consent, was overturned by the 5th Circuit Court of Appeals. The Supreme Court upheld that decision this year.[18]**

* A Kentucky state law requiring the posting of the Ten Commandments on public school classroom walls was held unconstitutional by the Supreme Court, even though the plaques were purchased with private contributions and included a notation emphasizing the Ten Commandments' "secular application ... clearly seen in its adoption as the fundamental legal code of Western civilization and the Common Law of the United States."[19]

* High school students in Williamsport, Pennsylvania requesting permission to form a club (called "Petros") on the same basis as other groups, and to meet regularly like other groups during regularly scheduled activity periods two mornings per week, were refused permission. The discriminatory denial was based on the fact that the speech and activities of "Petros" were religious in content.[20]

* All voluntary religious activities of students on school grounds were banned by a local school board in Dixon, Illinois (hometown of President Reagan). The same local school board restricts outside community groups to four uses per year of school facilities for meetings after school hours if the groups intend religious speech; non-religious groups have no such restrictions on after-school access.

Even the presence of religious symbols on public property has come under attack, and some jurisdictions have forbidden them as violating the First Amendment. The erection of a nativity scene as part of an annual Christmas display in Pawtucket, Rhode Island, was found unconstitutional by a federal judge.[21] The display of a lighted cross on the Los Angeles City Hall was banned by the California Supreme Court.[22] The federal government's involvement with a Christmas pageant staged on the ellipse and featuring a creche display was found by a federal court to violate the Establishment Clause because government officers were present on the pageant's governing boards, providing the "potential for and appearance of interference with religion," even though no government funds were used to maintain the creche.[23]

* Any carols mentioning Jesus Christ were banned from annual Christmas programs by the school superintendent in Ithica, New York.[24]

* The Prince George's County, Maryland, superintendent of schools abolished programs of religious music during Christmas and traditional periods of religious celebration, before backing off under local community pressure.[25]

* The Massachusetts state board of education virtually eliminated the display of religious objects or symbols and the presentation of religious music during Christmas and other holidays throughout the state. "No songs or music programs that have a significance for a particular religion should be sung or performed in the school during the period which coincides with the community celebration of the events portrayed in the music." The state legislature subsequently passed a law permitting local school communities to set guidelines for their own Christmas and holiday celebrations.[26]

Long-established religious practices in public buildings other than schools are also threatened.[27] For example:

* The Nebraska legislature's chaplaincy program was ruled unconstitutional by the 8th Circuit Court of Appeals this year.[28]

* **The U.S. House and Senate practices of retaining chaplains to open sessions with prayer is under court challenge by atheists. The D.C. Circuit Court of Appeals ruled that the atheists have standing to challenge the practice (though the court has not yet ruled on the constitutionality of Congressional chaplains).**[29]

* **A Pentagon Thanksgiving Day worship service, conducted under the Pentagon Pulpit Program begun by President Franklin D. Roosevelt in 1942, was ruled unconstitutional by a federal magistrate.**[30]

The extreme interpretation of the Establishment Clause has stimulated another serious threat to religious freedom in recent years. Proponents of liberalized abortion have attempted to muzzle their opponents who are motivated by religious convictions, as if religion somehow disqualified one from political participation. These opponents are subjected to ritualistic incantations of slogans about the "wall of separation" between church and state. Such intimidation threatens the tolerance of a pluralistic democracy, where every individual -- no matter from where he derives his political opinions -- is free to influence the government. During a debate on abortion in the Senate last year, one pro-abortion Senator accused his opponents of a "Cotton Mather mentality," of "a religious moralism I cannot share and I find narrow and unforgiving." Another Senator declared, "We do not legislate in God's name but in the name of the people of this country and its Constitution. That is the precept that is going to be violated by this type of legislation, and there will be no end to it."[31]

"The pro-abortionists also seek to rule out discussion of abortion in advance because it is a 'religious issue,'" observes Dr. Bernard Nathanson, former leading abortion activist and physician. "Our movement persistently tarred all opposition with the brush of the Roman Catholic Church or its hierarchy, stirring up anti-Catholic prejudices, and pontificated about the necessity for 'separation of church and state' ... as if no organized religious group has ever intruded into public affairs before, including the crusades on women's suffrage, civil rights and Vietnam."[32]

IV. Analysis of the Proposed Amendment

The proposed amendment would restore to American citizens the freedom to voluntarily pray in public schools and institutions, subject to state law It would restore the meaning of the Constitution to that existing before 1962 and 1963 when the Supreme Court decided voluntary school prayer and Bible reading violated the First Amendment. The proposed amendment also specifically protects the right of individuals not to participate in prayer.

The proposed amendment states:

> Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer.

1. The proposed amendment eliminates the federal prohibition against voluntary prayer.

With this amendment, federal judges could no longer interpret the Establishment Clause to prohibit the government from encouraging or facilitating individual or group prayer in public schools or other public institutions. Nor could the courts construe the Free Exercise Clause to forbid group prayer on the "implied coercion" theory (in Engel v. Vitale) that group prayer by consenting students has a coercive effect on objecting students in violation of the latter's right to free expression of religion.

2. It insures that prayer will be voluntary.

The proposed amendment specifically guarantees objecting students the right not to participate in prayer. However, the amendment deliberately avoids the word "voluntary," since federal courts (as in *Engel*)[33] have regarded group prayer as inherently involuntary under the "implied coercion" theory. The proposed amendment would offer protection to prayer objectors analagous to that given Pledge of Allegiance objectors by the Supreme Court's decision in the *West Virginia State Board of Education v. Barnette*,[34] which held that students cannot be forced to recite the Pledge of Allegiance. In that case, the Court said, "the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so." So also with school prayer; those who wish should be excused or remain silent, without interfering with or denying the rights of those who choose to participate.

3. It leaves decisions regarding prayers to state or local school authorities, and to individuals.

It would permit state and local authorities to decide whether or not group prayer will be conducted, and if it is, by whom it will be led. Authorities could permit student religious activities (such as prayer meetings outside class hours and grace before meals), subject to reasonable regulations.

If state and local authorities decide to use one particular prayer, the amendment would leave the content of that prayer to their judgment. This is necessary to prevent the federal courts from intervening with their own decisions about what is appropriate.

Similarly, the proposed amendment does not limit prayer to "nondenominational prayer," which the federal courts could interpret to rule out almost any prayer except one virtually devoid of religious content. References to God or a Supreme Being could be regarded as "denominational" by a non-theistic sect,[35] as could group readings from the Bible and other Judeo-Christian sources.[36]

In short, the proposed amendment would establish no uniform national prayer rule, but would allow a diversity of state and local approaches free of federal interference.

4. It does not create a new affirmative right to prayer.

The proposed amendment does not confer an affirmative right to prayer; it simply removes the obstacles to voluntary prayer created since 1962. The source of the right to prayer would still be the First Amendment guarantees of free exercise of religion and freedom of speech. As such, the right would be subject to reasonable restriction governing the time, place and manner of expression.

5. It would apply to "other public institutions" as well as public schools.

It would protect prayer not only in schools, but in other public institutions where it is threatened. In 1982, the Nebraska legislature's chaplaincy program was declared unconstitutional, atheists are currently challenging the constitutionality of Congressional chaplains in Washington, D.C. federal courts, and a Pentagon Thanksgiving Day service has been ruled unconstitutional.

V. The First Amendment: Does It Mean No Government Support for Religion?

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; ...
>
> Amendment I, U.S. Constitution

Although the First Amendment's Establishment Clause prohibited the Congress from creating an official national church, it was not intended to prohibit the federal government from recognizing and encouraging religion in general; such was not "establishing" religion. Nor was it designed to prohibit the states from establishing religion within their own borders. Quite the contrary. The amendment prohibited the federal government from interfering in whatever arrangements the states chose. Both disestablishmentarian Virginia and establishmentarian Massachusetts were alike free to go their own way.[37]

Thus, some states had established churches long after the Constitution was ratified. Massachusetts, for example, did not end its religious establishment until 1833.[38]

When the First Congress adopted what became the First Amendment, it chose the neutral phrase "no law respecting *an* establishment of religion" over an earlier version "no law establishing religion." The choice of the neutral phrase was intended to exclude the federal government from interfering with state establishments of religion. As Justice Joseph Story (who served on the U.S. Supreme Court 1812-1845, and also taught law at Harvard University 1829-1845) wrote in 1833:

> ... it was deemed advisable to exclude from the national government all power to act upon the subject.... Thus, the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions;...[39]

Nor did the First Amendment mean discouragement of religion or even indifference toward it. Justice Story commented:

> Probably at the time of the adoption of the Constitution, and of the [first] amendment to it ... the general, if not the universal sentiment in America was, that Christianity ought to receive *encouragement* from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and *to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation*.[40] (Emphasis added.)

In a major new (1982) study, Prof. Robert L. Cord scrutinizes the drafting of the First Amendment and concludes that it was intended to accomplish three purposes regarding religion: first, to "prevent the establishment of a national church or religion, or the giving of any religious sect or denomination a preferred status"; second, to "safeguard the right of freedom of conscience in religious beliefs against invasion solely by the national government"; and third, to "allow the States, unimpeded, to deal with religious establishments and aid to religious institutions as they saw fit."

"There appears to be no historical evidence," summarizes Cord, "that the First Amendment was intended to preclude Federal governmental aid to religion when it was provided on a nondiscriminatory basis. Nor does there appear to be any historical evidence that the First Amendment was intended to provide an absolute separation or independence of religion and the national state. The actions of the early Congresses and Presidents, in fact, suggest the opposite."[41]

VI. "Separation of Church and State": Fact and Fiction

In Engel (1962) and Schempp (1963) the Supreme Court found it an unconstitutional "establishment of religion" for a state to foster prayer or Bible readings by students in public schools. "The separation" of church and state, said the Court, "must be complete and unequivocal."[42]

But as Justice Stewart noted sarcastically in his dissent to Engel, "I think that the Court's task ... is not responsibly aided by the uncritical invocation of metaphors like 'wall of separation,' a phrase nowhere to be found in the Constitution."[43]

In an oft-quoted statement, Jefferson said that the Establishment Clause built "a wall of separation between Church and State."[44] But this comment is hardly the definitive interpretation of the First Amendment.[45] The statement was contained in a private letter (to the Danbury Baptist Association) in 1802, written 13 years after the amendment was drafted, by a man who was away in France at the time the First Congress drew up that amendment.

Those who uncritically invoke Jefferson's statement ignore Jefferson's maturer commentary three years later in his Second Inaugural Address in 1805.[46] On that occasion, he placed the wall of separation not between church and state, but where the Framers of the First Amendment placed it -- between the federal government and state government on matters of religion.[47]

> In matters of religion I have considered that its free exercise is placed by the Constitution independent of the powers of the General [federal] Government. I have therefore undertaken on no occasion to prescribe the religious exercises suited to it, but have left them, as the Constitution found them, under the direction and discipline of the state or church authorities acknowledged by the several religious societies.[48]

Jefferson's example provides little support for the position of completely eradicating nonsectarian religion from public schools. In his plan for the University of Virginia, which he founded with public funds, he said that "The proof of the being of a God, the Creator, Preserver, and Supreme Ruler of the Universe, the author of all the relations of morality, and the laws and obligations which these infer, will be in the province of the professor of ethics." For the library, he purchased works on the evidences of Christianity, provided for a special room in the rotunda "for religious worship," and supported a proposal to invite the four major religious denominations of Virginia to establish seminaries within or adjacent to the university and have their clerical professors occasionally preach there. He acknowledged that "the want of instruction in the various creeds of religious faith among our citizens" was a "chasm" at the university.[49]

"Even in establishing a quasi-state university on broad lines," concluded Anson Phelps Stokes, a leading authority on church-state relations in America, "the greatest liberal who took part in the founding of our government felt that instruction in the fundamentals of Christian Theism and Christian worship were both important and proper."[50]

In his first message as President, Jefferson asked, "can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that their liberties are the gift of God."[51]

As President, Jefferson plainly encouraged religion when he negotiated and signed an 1803 treaty with the Kaskaskia Indians under which he requested and spent federal money to build a Catholic church and pay a Catholic priest. He also supported general land grant trust laws as inducements to the Society of the United Brethren for (as the law stated) "Propagating the gospel among the heathen." Just as Jefferson's historical record belies the mythmaking of the extreme separationists, so also Madison's record has been distorted. In the same year (1785) of his "Memorial and Remonstrance against Religious Assessments" (against Patrick Henry's bill to discriminatorally support one religion with tax funds), and the same day he proposed Jefferson's "Religious Liberty Bill" in the Virginia Assembly, Madison introduced another bill for Jefferson in the Virginia Assembly -- a "Bill for Punishing ... Sabbath Breakers." (Both bills became law in 1786.) Madison supported the chaplaincy system in Congress, and as President proclaimed Thanksgiving Day.[52]

VII. The Myth of Neutrality -- Establishing a Religion of Secularism?

In its 1962 and 1963 decisions, the Supreme Court construed the First Amendment Establishment Clause to require strict "neutrality" toward religion. Any "religious exercise" required to be performed in school, even those from which students may be excused, breach the standard of neutrality. Even "relatively minor encroachments" are indefensible. "The breach of neutrality that is today a trickling stream may all too soon become a raging torrent."[53]

The inevitable result of these interpretations of the Establishment Clause is not government neutrality toward religion, but rather government exclusion of religion which, as Justice Stewart noted in his dissent to the Schempp decision, amounts to discouragement of religion and establishment of a "a religion of secularism" in its place:

> For a compulsory state education system so structures a child's life that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. Viewed in this light, permission of such exercises for those who want them is necessary if the schools are truly to be neutral in the matter of religion. And a refusal to permit religious exercises thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism, or at least, as government support of the beliefs of those who think that religious exercises should be conducted only in private."[54] (Emphasis added.)

Under the dogma of "neutrality," one set of beliefs (theistic) is censored from the schools while opposing beliefs (secular) go unchallenged. This "neutrality" puts government in the position of fostering an academic environment in which God is irrelevant, and autonomous man is central. Such discrimination is hardly genuine neutrality. The irony is that the Supreme Court recognized Secular Humanism as a non-theistic religion.[55] Thus, in the name of "neutrality," the "religion of secularism" (as Justice Stewart called it) has become the governmentally established and preferred religion in our public schools.

The exclusion of theistic religion from the schools has had a negative impact far beyond the elimination of the devotional exercises themselves. William F. Buckley, Jr., noted that

> Will Herberg, the late distinguished Jewish theologian and sociologist, made it the gravamen of his criticism of the Court's antiprayer decision that it has the simple potential of disturbing the philosophical perspective of the student. A mere mention of God, in the official curriculum, introduces a dimension to learning arguably the most important of all. The scientists insist that the point should be stressed that we are all -- snakes, woodpeckers, and human beings -- animals. They have a (limited) point. Someone should be permitted to suggest, if the parents believe that he should, that we are all of us -- Protestant, Catholic, Jew, atheist, genius, idiot -- made in the image of God. The tickling of that sensibility by common prayer is thought important by -- the majority of the American people.[56]

VIII. America's Heritage as a Nation "Under God"

From the beginning, America has been a profoundly religious nation with a tradition of publicly declaring and encouraging a belief in and dependence upon God.

And from the beginning, education was treated as an enterprise with inseparable religious and moral components. To the Founders, a wholly secular education would have been a contradiction in terms, a recipe for certain disaster.

Thus, in the same year it approved the Constitution in 1787, Congress bound education, religion and government together in the Northwest Ordinance. As one of the six articles it established "for extending the fundamental principles of civil and religious liberty" in the Northwest territory, Congress stipulated:

> Article 3: Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.[57]

Consistent with the heritage, public schools have included some form of prayer from the outset, and for 170 years after the adoption of the First Amendment, prayer was not only permitted but also encouraged in the public schools.

A notable example is the Massachusetts Board of Education, when Horace Mann (who is generally credited with being the father of modern public education in America) was Secretary. Under Mann's liberal direction, the Board removed sectarian instruction from the public schools, but also mandated a program of "daily Bible readings, devotional exercises and the constant inculcation of the precepts of morality."[58]

> He [Mann] took a firm stand against the idea of a purely secular education, and on one occasion said he was in favor of religious instruction "to the extremest verge to which it can be carried without invading those rights of conscience which are established by the laws of God, and guaranteed to us by the Constitution of the State."

> At another time he said that he regarded hostility to religion in the schools as the greatest crime he could commit. Lest his name should go down in history as that of one who had attempted to drive religious instruction from the schools, he devoted several pages in his final Report -- the twelfth -- to a statement in which he denied the charges of his enemies.[59]

Even Thomas Jefferson, the disestablishmentarian, supported a religious emphasis in public education. For his publicly financed University of Virginia, he planned religious instruction in the classroom, religious books in the library, a special room for worship, and educational services to students of seminaries which were invited to be established adjacent to the university.[60]

As President Reagan said at this year's National Day of Prayer (May 6, 1982),

> Prayer has sustained our people in crisis, strengthened us in times of challenge, and guided us through our daily lives since the first settlers came to this continent. Our forebearers came not for gold, but mainly in search of God and the freedom to worship in their own way....
>
> The morality and values such faith implies are deeply embedded in our national character. Our country embraces those principles by design, and we abandon them at our peril. Yet in recent years well-meaning Americans in the name of freedom have taken freedom away. For the sake of religious tolerance, they've forbidden religious practice in our public classrooms. The law of this land has effectively removed prayer from our classrooms....
>
> Thomas Jefferson once said, "Almighty God created the mind free." But current interpretation of our Constitution holds that the minds of our children cannot be free to pray to God in public schools. No one will ever convince me that a moment of voluntary prayer will harm a child or threaten a school or state. But I think it can strengthen our faith in a Creator who alone has the power to bless America.

In the American tradition, religion is a vital part of our *public* life, not segregated to merely private observance, and in that tradition government recognizes God's reality and blessing as the foundation upon which it stands. In *Democracy in America*, Alexis de Tocqueville observed that Americans hold religion to be "indispensable to the maintenance of republican institutions," because, "while the law permits the Americans to do what they please, religion prevents them from conceiving and forbids them to commit, what is rash or unjust." In a famous passage, he said,

> I sought for the greatness and genius of America in her commodious harbors and her ample rivers, and it was not there; in her fertile fields and boundless prairies, and it was not there; in her rich mines and her vast world commerce, and it was not there. Not until I went to the churches of America and heard her pulpits aflame with righteousness did I understand the secret of her genius and power. America is great because she is good and if America ever ceases to be good, America will cease to be great.

George Washington, in his Farewell Address, warned that religion was essential for "political prosperity." He cautioned,

> Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports.... And let us with caution indulge the supposition that morality can be maintained without religion.... [R]eason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

The Declaration of Independence acknowledges God as the source of our liberty when it proclaims it "self-evident" that all men "are endowed by their Creator with certain unalienable Rights," and when it appeals to "the Supreme Judge" and declares reliance on "the protection of Divine Providence."

The day after proposing the First Amendment, the First Congress called on President Washington to proclaim "a day of public thanksgiving and prayer" to ackowledge "the many signal favors of Almighty God."

That the Founders neither intended to exclude prayer from government nor to make it merely ceremonial is shown by Benjamin Franklin's appeal to the Constitutional Convention:

> I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth -- that God governs in the affairs of men.... I also believe that without his concurring aid we shall succeed in this political building no better than the Builders of Babel: We shall be divided by our little partial local interests; our projects will be confounded, and we ourselves shall become a reproach and bye word down to future ages.... I therefore beg leave to move -- that henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business.

"Just as Benjamin Franklin believed it was beneficial for the Constitutional Convention to begin each day's work with a prayer," said President Reagan in his message to Congress on May 17, 1982, "I believe that it would be beneficial for our children to have an opportunity to begin each school day in the same manner."

Coins have carried the inscription, "In God We Trust," since 1865, and this was made the national motto in 1956. The words, "Under God," were added to the Pledge of Allegiance by Congress in 1954. "The Star-Spangled Banner," made our National Anthem by Congress in 1931, includes the phrases "Praise the Pow'r that hath made and preserved us a nation" and "And this be our motto, 'In God is our Trust.'" "America" concludes, "Our fathers' God to Thee, Author of Liberty, to Thee we sing./Long may our Land be bright with freedom's holy light,/Protect us by Thy might, Great God our King."

Even the Supreme Court has recognized our religious character. Justice William O. Douglas wrote in the *Zorach v. Clauson* case,

> *We are a religious people whose institutions presuppose a Supreme being....* We find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.[61] (Emphasis added.)

IX. Public Opinion and Voluntary School Prayer

Public Opinion polls show that Americans overwhelmingly prefer voluntary prayer in public schools, by a margin of three or four to one.

1. The Gallup Poll, June 10, 1982

Of informed Americans (those who have both heard or read about the President's amendment and can offer arguments pro and con), 79% favor, only 16% oppose, and majority support is found in each region of the nation and among all major population groups, as well as among both church members and non-members.

Question: "Do you favor or oppose this proposed amendment?"

	Favor	Oppose	No opinion
National	79%	16%	5%
Church members	83	13	4
Non-members	68	24	8
Regular Church attenders	86	9	5
Non-regular attenders	73	21	6
Protestants	82	13	5
Catholics	82	11	7

2. NBC/AP Poll, May 24, 1982

Two-thirds of the public favor enactment of an amendment to permit organized prayer in public schools. Even among self-identified liberals, a majority say they favor this proposal.

Question: "Do you favor or oppose an amendment to the Constitution that would permit organized prayers in public schools?"

	Liberals	All
Favor	55%	68%
Oppose	39%	27%
Not sure	6%	5%

3. CBS/New York Times Poll, May 6, 1982

Support for school prayer occurs among all age groups, all regions, all ideological identifications. Rank and file Democrats support school prayer at least as strongly as Republicans.

Question: "What is your opinion? Should organized prayer in the public schools be permitted or forbidden?"

	Total	Republican	Independent	Democrat
Permitted	69%	73%	61%	74%
Forbidden	18	16	21	15
Depends (voluntary)	7	6	10	6
No Opinion	6	5	8	5

4. ABC/Washington Post Poll, March 10, 1982

Question: "On the subject of the reading of prayer in public schools, do you approve or disapprove of schools having a required time for the regular reading of prayer?"

	All	Elderly (62+ years)
Approve of required time	69%	77%
Disapprove of required time	28	19
Don't know/no opinion	3	4

5. Los Angeles Times Poll, conducted September 27 - October 4, 1981

Women approve school prayer even more strongly than men.

Question: "Generally speaking, do you approve or disapprove of allowing prayers in public schools?"

	Men	Women	18-29 Years	65+ Years	Not HS Grad	Some College	Total
Approve	73%	81%	72%	82%	79%	73%	78%
Disapprove	22	17	26	17	18	22	19
Not sure	5	2	2	1	3	5	3
Refused	0	0	0	0	0	0	0

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THE WHITE HOUSE
WASHINGTON

May 6, 1982

QUESTIONS AND ANSWERS ON THE PRESIDENT'S PROPOSED VOLUNTARY SCHOOL PRAYER AMENDMENT

1. Q) Will the amendment overrule, abolish, or modify the First Amendment to the Constitution?

A) No. The voluntary school prayer amendment will be consistent with the original purpose of the First Amendment, which was to enhance the opportunities of citizens to worship as they see fit. For 170 years after the adoption of the First Amendment, prayer was permitted in the public schools. In 1962, the Supreme Court held that prayer in the public schools violated the First Amendment provision forbidding an "establishment of religion".

Justice Potter Stewart, in a strong dissent from the Court's opinion, pointed out that the purpose of the Establishment Clause was to prevent the Federal Government from establishing an official religion. Justice Stewart pointed out that permitting school children to participate voluntarily in prayer is a far cry from designating a particular religion to which citizens must subscribe. He pointed out that the two Houses of Congress open their daily sessions with prayers, that our coins, our Pledge of Allegiance, and our National Anthem all reflect the truth that "we are a religious people whose institutions presuppose a Supreme Being." Engel v. Vitale, 370 U. S. 421 (1962) (Stewart, J., dissenting).

2. Q) How will the amendment guarantee that nobody will be coerced into participating in prayer or religious exercise?

A) The amendment will guarantee that no person shall be required by the United States or by any state to participate in prayer. Lower federal court decisions have suggested, for instance, that prayers by unofficial groups of students who congregate after class hours of their own volition are not really voluntary because other students might feel subtle pressure to join in the prayer. The amendment will reject such an approach.

3. Q) What is to prevent school districts from imposing particular religious doctrines on school children?

A) The amendment will rely on two factors to guard against the imposition of sectarian beliefs:

First, the American political tradition is one of respect for diversity and for freedom of religious expression. It would be wrong to assume that states and localities would seek to stifle diversity or to offend members of their communities who hold minority religious views. In fact, prior to 1962, local school authorities demonstrated a respect both for religion and diverse views about religion.

Second, the amendment will absolutely forbid public schools or other government agencies from requiring anyone to participate in any prayer or religious exercise. Anyone who is offended by the content of any prayer -- whether he is a member of a minority religious group, an atheist, or anyone else -- can simply refuse to participate; this constitutional right of refusal will be an absolute safeguard against the imposition of sectarian forms of worship.

The Lord's Prayer and the Ten Commandments are reflections of our Judaeo-Christian heritage that could not fairly be described as instruments for the imposition of narrow sectarian dogmas on school children. Indeed, any reference to a "personal" God who is more than a mere "life-force" might be "denominational" insofar as it reflected the general beliefs of Judaism and Christianity to the exclusion of those who reject the idea of a personal God.

4. Q) Will the amendment affect other public institutions besides public schools?

A) Yes but this provision would effect little or no change in present judicial interpretations of the First Amendment. As Justice Stewart pointed out in his dissent in Engel v. Vitale, prayer is an important part of our national heritage and of our daily community life. Prayer in public places other than schools -- in public parks, in prisons, in hospitals, in legislatures, in Presidential Inaugural Addresses -- has never been held to violate the Constitution. The United States Supreme Court begins all its sessions with reference to Almighty God. The amendment would reaffirm this interpretation, subject to the right of every individual to refuse to participate in prayer or religious exercise.

5. Q) Would the amendment have any intended effect on pending court actions against prayers in sessions of Congress and against the retention of chaplains in the armed services?

A) The amendment would reaffirm the constitutionality of prayers in Congress and of armed service chaplains.

6. Q) Will the amendment have any effect on the question of government aid to religious schools, or "tuition tax credits"?

A) No. Judges and constitutional scholars hold a wide range of opinions on the extent to which government may directly or indirectly aid religious institutions. The amendment will deal only with public institutions and would not affect the constitutional status of private institutions.

7. Q) Will the amendment require school boards or other government agencies to permit students to pray in school?

A) No. The amendment will simply remove any constitutional obstacle to voluntary prayer. If school boards decided that such prayers were a bad idea, they would be exactly as free to exclude prayer from the schools as they are now. But states and local school boards would also be free to permit voluntary prayer, a power that is now denied them.

8. Q) Will state governments or local school boards be free to compose their own prayers if this amendment is ratified?

A) Yes. Since the voluntary school prayer amendment will eliminate any federal constitutional obstacle to voluntary school prayer, states and communities would be free to select prayers of their own choosing. They could choose prayers that have already been written, or they could compose their own prayers. If groups of people are to be permitted to pray, someone must have the power to determine the content of such prayers.

The amendment will accept the premise that communities are a more appropriate forum than federal courts for decisions about the content of school prayers. Of course, no student or any other individual will be required to participate in any prayer to which he objected for any reason.

9. Q) Why are you proposing a constitutional amendment rather than statutory changes to restore the right to prayer in schools and public institutions?

A) Legislative enactments will not be sufficient to overcome Supreme Court interpretations of constitutional provisions. Proposals to limit Supreme Court jurisdiction, even if constitutional, would not reverse existing Supreme Court decisions and would be inappropriate as a matter of policy.

10. Q) What is the status of support in the Congress and in the states for restoring voluntary school prayer?

A) A wealth of national poll data shows overwhelming public support for restoring voluntary school prayer. In the 97th Congress, there are now pending thirteen bills and nine proposed constitutional amendments designed to restore the opportunity for voluntary school prayer.

State legislatures have repeatedly tried to restore this right to their public school children.

FOOTNOTES

1. May 17, 1982.

2. 370 U.S. 421 (1962).

3. 374 U.S. 203 (1963). The companion cases were decided together. William Murray, the student named in Murray v. Curlette, is the son of atheist militant Madalyn Murray O'Hair. He grew up to become a Christian at the age of 33. "It is my goal," he now says, "to reach out to all the lives, all the families, all the communities that my mother has damaged with her atheistic thoughts and to restore them." His 1982 book, My Life Without God, details his mother's political involvement with radical groups (including the Communist Party) and her attempt to defect with her sons to the U.S.S.R.

4. Brandon v. Board of Education, 635 F. 2d 971 (2d Cir. 1980), cert. denied, 102 S. Ct. 970 (1981), rehearing denied, 102 S. Ct. 1493 (February 2, 1982). See also Trietley v. Board of Education 65 A.D. 2d 1, 409 N.Y.S. 2d 912 (1978).

5. Tinker v. Des Moines School District, 393 U.S. at 506 (1969). The Supreme Court said, "[I]n our system, undifferentiated fear of apprehension of disturbance is not enough to overcome the right to freedom of expression." Id at 508. Decisions like Brandon withdraw the protection of this lofty proclamation from religious expression.

6. Brandon, 980. "When the explicit Establishment Clause proscription against prayer [sic!*] is considered ... the protections of political and religious speech ... are inapposite.... In short, ... the students' free speech and associational rights, cognizable in a 'public forum,' are severely circumscribed by the Establishment Clause in the public school setting. Because of the symbolic effect that prayer in the schools would produce, we find that Establishment Clause considerations must prevail in this context." (Emphasis added.) Id. at 980. Also, "even if we were to accept the students' contention that the School Board's refusal to allow school prayer significantly encumbered their free exercise rights, a 'compelling state interest' against the prayer meetings was present." (Emphasis added.) Id. at 978. Apparently the Supreme Court's Tinker doctrine -- that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (Tinker, 506) applies only to some students. (* Such an "explicit Establishment Clause proscription against prayer" is cut from whole cloth, and is a commentary more on judicial revisionism than on the Framers' intent in the First Amendment itself. See Sections V-VIII of this Backgrounder.)

7. Brandon at 978. The court's reasoning follows a tortured chain of unsubstantiated assertions and hypothetical clauses, and lacks credibility to justify the finality of the court's conclusion and the severity of its sweeping judgment against religious expression. To the hapless "impressionable" adolescent mentioned by the court, "even the mere appearance of secular involvement" might indicate" state approval causing an impermissibly "dangerous" symbolic inference;" the "adolescent may perceive 'voluntary' school prayer" differently "if he were to see" the football captain, etc. The "misconceptions" (possible? probable? certain?) are qualified further by an additional hypothetical -- they "may never be corrected." Id. at 978.

8. CLS memo, June 28, 1982. "If Brandon is followed, there is no clear line drawn as to what religious activity (or what freedom of speech) is permissible by students. Brandon's stance may be read to prohbiit even two students from praying together in a cafeteria corner at lunch, to outlaw students from saying

grace collectively or indiviuually before lunch when they so desire, or to deny individual students the right to carry their Bibles in the school building. The court fails to explain why high school students who are so impressionable as to be swayed by seeing the football captain pray in a communal prayer group would not be equally influenced by seeing him pray alone in a 'moment of silence' before class begins. At what point do the free speech, free association and free exercise of religion rights of the individual student become strong enough to overcome such supposed lack of common sense of some of his fellow students? How much of his rights must the religious student sacrifice for the impressionable and immature fellow student? The Brandon opinion drawn to its logical conclusion suggests that the curtailment of rights has no limit, that the First Amendment rights of individuals will be sacrificed on the Establishment Clause altar as long as one fellow student may be too simple to recognize the state neutrality behind an equal access policy." Brief of plaintiffs filed September 3, 1982, Bender v. Williamsport Area School District, No. 82-0692 (M.D. Pa. 1982), 37.

9. James v. Board of Education, 461 F. 2d 566 (2d Cir. 1972), cert. denied, 409 U.S. 1042. The armband was "an expression of [the teacher's] religious aversion to war in any form." (Emphasis added.) Id. at 568. We have in the same court's decisions an apparently highly selective application of First Amendment protection of religious expression: it is protected when opposing a war in school, unprotected when praying in school.

10. Id. at 568.

11. Russo v. Central School District, 469 F. 2d (1972), cert. denied, 411 U.S. 932 (1973). The case involved a probationary art teacher who, against school policy, refused to salute the flag or recite the Pledge of Allegiance with her homeroom class. The court upheld the teacher's right to express herself in that manner, even though a teacher's homeroom students are obviously a more "captive audience" than students in a high school where (as in the Brandon case) the voluntary group wishes to meet before classroom hours and without a teacher.

Regarding the maturity of students, also see: Bayer v. Kinzler, 383 F. Supp. 1164 (E.D.N.Y., 1974), aff'd without opinion, 515 F. 2d (2d Cir. 1975) (a federal district judge decided high school students were sufficiently mature to read information about contraception and abortion published in the student newpaper, and overturned the school's seizure of the student newpaper containing articles on contraception and abortion); Wilson v. Chancellor 418 F. Supp. 1358 (D. Or. 1976) (a federal court in Oregon characterized today's high school students as "surprisingly sophisticated, intelligent, and discerning. They are far from easy prey for even the most forcefully expressed, cogent, and persuasive words," and overturned a school board's ban of "all political speakers" as violating "the students' right to hear, the teachers' right of freedom of expression, and the Equal Protection Clause"). Cited in brief of plaintiffs, filed September 3, 1982, Bender v. Williamsport Area School District, No. 82-0692 (M.D. Pa. 1982), 39-40.

12. Russo at 633. This picture of tenth graders bears little resemblance to the "impressionable" students in the Brandon case who are so vulnerable to permanent "misconceptions" that the state must shield them from exposure to even the hypothetical possibility of peer pressure.

13. Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F. 2d 1038 (5th Cir. 1982).

14. State Board of Education v. Board of Education of Netcong, N.J., 108 N.J. Super 564, 262 A. 2d 21, aff'd 57 N.J. 172, 270 A. 2d 412 (1970), cert. denied, 401 U.S. 1013 (1971). When students and parents later argued that a mandatory state sex education policy violated their religious rights, the New Jersey Supreme Court rejected their position. Smith v. Ricci, 89 N.J. 514 (1982).

15. Collins v. Chandler Unified School Dist., 644 F. 2d 759 (9th Cir. 1981), cert. denied, 102 S. Ct. 322 (1981). The prohibited practice resulted from a request by the Chandler (Arizona) High School Student Council which was approved by the principal.

16. Stein v. Oshinsky, 348 F. 2d 999 (2d Cir. 1965), cert. denied, 382 U.S. 957 (1965). The children recited these simple prayers: "God is Great, God is Good and We Thank Him for our Food, Amen." And, "Thank You for the World so Sweet, Thank You for the Food We Eat, Thank You for the Birds that Sing -- Thank You, God, for Everything." In his decision, Judge Friendly gave broad powers to schools that restrict religious expression: "After all that the states have been told about keeping the 'wall between church and state ... high and impregnable,' ... it would be rather bitter irony to chastise New York for having built the wall too high or too strong."

17. DeSpain v. DeKalb County Community School District, 384 F. 2d 836 (7th Cir. 1967), cert. denied, 390 U.S. 906 (1968).

18. Karen B. v. Treen, 653 F. 2d 897 (5th Cir. 1981), aff'd mem. 102 S. Ct. 1267 (1982). Accord, Kent v. Commissioner of Education, 402 N.E. 2d 1340 (Mass. 1980).

19. Stone v. Graham, 449 U.S. 39 (1980).

20. The students have filed for declaratory judgment and permanent injunction, in Bender v. Williamsport Area School District, No. 82-0692 (M.D. Pa 1982).

21. Donnelly v. Lynch, 525 F. Supp 1150 (D.R.I. 1981).

22. Fox v. City of Los Angeles, 587 P. 2d 663 (Ca. S. Ct. 1978).

23. Allen v. Morton, 495 F. 2d 65 (D.C. Cir. 1975).

For further discussion of such cases, see also, Kim Michael Lavalle, "Constitutional Law -- Establishment Clause -- Erection and Maintenance of Religious Symbols by Government Entitites," Wayne L. Rev., 48: 1978, 1103 ff.

These cases illustrate how insistent the extreme separationists are that all traces of religion be driven from public life. However, policy in this regard is not uniform throughout the country, and in other cases courts have held constitutional the inclusion of a nativity scene in Christmas displays sponsored by the city of Denver (Citizens Concerned for Separation of Church and State v. City and County of Denver, 508 F. Supp. 823 (D. Colo. 1981), the maintenance of a 51-foot illuminated cross on a public park hilltop (Eugene Sand and Gravel, Inc. v. City of Eugene, 588 P. 2d. 338 (Ore. 1978), and the erection by a private group of a creche on school property during a Christmas recess (Lawrence v. Buchmuller, 40 Mics. 300, 243 N.Y.S. 2d 87 (S. Ct. Westchester County, 1963)). In the present climate created by the Supreme Court, one wonders how long even these vestiges will survive.

24. Note, N.Y.U. L. Rev., 48. Dec., 1973, 1144 (n. 174).

25. Id. 1128.

26. Id., 1128-29.

A recent decision by the 8th Circuit Court of Appeals (Florey v. Sioux Falls School District, 619 F. 2d 1311 (8th Cir. 1980), cert. denied, 449 U.S. 987 (1980)), upheld Sioux Falls' Christmas pageants which contain religious hymns and dialogue about the birth of Christ. But these are not religious observances. As the school superintendent said, "The use of any materials that are religious in theme are to be used only for their literary or artistic merit and they're not to be used in a worshipful way." (AP, November 10, 1980.)

The authors of the "Note" (n. 24, supra), recommend model guidelines for religious holiday observances in public schools, including: "II. The content of any such programs must relate only to the secular aspect of the holiday. A. Cultural or secular symbols of the holiday, such as the Easter bunny, Thanksgiving turkey, Santa Claus, etc., may be utilized. B. Festive and seasonal songs such as 'Easter Parade,' 'Over the River and Through the Woods,' 'Deck the Halls,' 'White Christmas,' etc., may be performed. III. No element of religious content may be included.... B. Hymns, songs, carols, plays, pageants or tableaux expressing reverence to God, Jesus, Buddha, Mohammed or any other religious prophet or leader, may not be prepared or performed as part of a holiday observance...." (Id., 1144.)

27. For, as Justice Douglas said in concurring with the Engel decision against state-supported school prayer, "What New York does on the opening of its public schools is what we do when we open court ... [and] what each House of Congress does at the opening of each day's business." Engel, 439-40.

28. Chambers v. Marsh, No. 81-1077 (8th Cir. April 14, 1982). But see Zorach v. Clauson, 343 U.S. at 312-13 (1952), suggesting that "[p]rayers in our legislative halls" do not "flout() the First Amendment." The Massachusetts Supreme Judicial Court upheld the constitutionality of that state's legislative chaplaincy (Colo v. Treasurer and Receiver General, 392 N.E. 2d 1195 (Mass., 1979)).

29. Murray v. Buchanan, No. 81-1301 (D.C. Cir. March 9, 1982). Subsequently, on July 16, 1982, the same Appeals Court granted a motion for a rehearing by the full court on the atheists' standing and the justiciability of the issue. The rehearing is currently scheduled for October 27, 1982.

30. U.S. v. Sheil, Docket No. 284898 (E.D. Va. 1978), unpublished opinion of U.S. Magistrate Quin S. Elson. The program's past guest speakers have included Billy Graham, Fulton J. Sheen, and Norman Vincent Peale. By contrast with this ruling, the First Congress, the day after proposing the First Amendment, called on President Washington to proclaim "a day of public thanksgiving and prayer" to "acknowledge the many signal favors of Almighty God." The Pentagon does not regard the Elson decision as a binding precedent, and continues to hold religious services, prayer breakfasts, etc. However, Magistrate Elson says he would make the same finding if presented with identical facts. (Letter to present writer, September 14, 1982.)

31. John D. Klenk, "Why Abortion is not a 'Religious Issue,'" Human Events, September 12, 1981, 10; reprinted in Congressional Record, October 5, 1981, E4618-19.

32. Id., quoting Aborting America, N.Y.: 1979, 176. In his 1858 debates with Abraham Lincoln, Stephen Douglas sounds surprisingly modern when he ridiculed Lincoln for his "doctrine that this government was in violation of the law of God, which says that a house divided against itself cannot stand," and because "He [Lincoln] is going to extinguish slavery ... He intends to do that in the name of humanity and Christianity, in order that we may get rid of the terrible crime and sin [of slavery]." (Documents of American History, Henry Steele Commager, Ed., 9th edition, Englewood Cliffs: 1960, 259-260, 267.) Of course, Douglas was technically correct; Lincoln's "house divided" theme was taken from the Bible. Would that, for today's extreme separationists, have made Lincoln's campaign suspect as "religious moralism" and "legislating in God's name"?

Just as today's conservatives are criticized for attacking Supreme Court decisions, so also Lincoln was censured by Douglas for his "crusade against the Supreme Court of the United States." (Id., 259.)

Planned Parenthood, the American Civil Liberties Union (ACLU) and other groups argued in federal courts, including the Supreme Court, that the Hyde Amendment was an establishment of religion, and also violated the Free Exercise Clause of the First Amendment. Brooklyn Federal District Judge John Dooling agreed that it violated the Free Exercise Clause (among other impediments) and declared it unconstitutional. By a narrow 5-4 majority, the Supreme Court reversed Judge Dooling's decision. McRae v. Califano, 491 F. Supp. 630 (1980), Harris v. McRae, 448 U.S. 297 (1980).

33. "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." (Emphasis added.) Engel, 431.

34. 319 U.S. 624 (1943).

35. "Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others." Torcaso v. Watkins, 367 U.S. at 495, n. 11 (1961). Transcendental Meditation was construed by one court as a "constitutionally protected religion." Malnak v. Yogi, 592 F. 2d 197, 214 (3d Cir 1979).

36. Schempp, 282 (Brennan, J., concurring, that "any version of the Bible is inherently sectarian").

37. Id., 309-10 (Stewart, J., dissenting).

38. There were established churches in at least eight of the thirteen colonies at the time of the Revolution, and Protestant groups were accorded preferential treatment in at least four of the remaining five. (The Church of England was established in Maryland, Virginia, North Carolina, South Carolina, and Georgia. The Congregational Church was established in New Hampshire, Connecticut, and Massachusetts. New York, New Jersey, Delaware and Pennsylvania discriminated against Catholics, though they had no established churches. P. Raymond Bartholomew, "Religion and the Public Schools," Vanderbilt L. Rev., 1967, 20:1078-79. For a history of religious establishment in the 13 original states, see Anson Phelps Stokes, Church and State in the United States, N.Y.: 1950, Vol. I:427-446, and Isaac A Cornelison, The Relation of Religion to Civil Government in the United States of America, New York: 1895, 1970, 96-111.

39. Commentaries on the Constitution of the United States, Boston: 1833, Vol. III: 730-731. Also Edward S. Corwin, Editor, The Constitution of the United States of America, Library of Congress Legislative Reference Service, Washington, D.C.: 1953, 758. "At the same time, the phrase 'an establishment' seems to ensure the legality of nondiscriminatory religious aid. Had the framers prohibited 'the establishment of religion,' which would have emphasized the generic word 'religion,' there might have been some reason for thinking they wanted to prohibit all official preferences of religion over irreligion. But by choosing 'an establishment' over 'the establishment,' they were showing that they wanted to prohibit only those official activities that tended to promote the interest of one or another particular sect." Michael J. Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment," Washington, D.C.: 1978, 14.

40. Story, supra, Vol. III: 726. "The real object of the amendment was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government." Id., 728.

41. Robert L. Cord, Separation of Church and State: Historical Fact and Current Fiction, New York: 1982, 15.

42. Schempp, 219-220, quoting Zorach v. Clauson, 343 U.S. at 312 (1952).

43. Engel, 445-46 (Stewart, J., dissenting).

44. The Writings of Thomas Jefferson, Monticello Edition, Washington, D.C.: 1904, 282.

45. As former Solicitor General Erwin N. Griswold noted, Jefferson's statement, while "a powerful way of summarizing the effect of the First Amendment" was "clearly neither a complete statement nor a substitute for the words of the Amendment itself." ("Absolute is in the Dark -- A Discussion of the Approach of the Supreme Court to Constitutional Questions," 8 Utah L. Rev., 167, 174 (1963). Cited in the Justice Department's analysis of President Regan's proposed Constitutional amendment, May 14, 1982.)

46. The noted constitutional scholar, Edward S. Corwin, calls the 1805 statement "a very different, and presumably more carefully considered, opinion upon the purpose of Amendment I" than that of 1802. Supra, 759.

47. John W. Whitehead, The Separation Illusion: A Lawyer Examines the First Amendment, Milford, Michigan: 1977, 89 f.

48. The Writings of Thomas Jefferson, Memorial Edition, Washington, D.C.: 1903, 378. That his 1805 restatement represents Jefferson's settled conviction is confirmed by a letter to Rev. Samuel Miller in 1808: "I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made respecting the establishment or free exercise of religion, but from that also which reserves to the States the powers not delegated to the United States. Certainly, no power to prescribe any religious exercise, or to assume any authority in religious discipline, has been delegated to the General [federal] Government. It must then rest with the states, as far as it can be in any human authority." (Emphasis added.) The Jefferson Cyclopedia, John N. Foley, Ed., New York: 1900, 742.

49. Stokes, supra, I: 337-38.

50. Id., I: 338. It is worth noting that when the liberal scholar and attorney Leo Pfeffer (who has argued and/or written amicus briefs in over half the Establishment Clause cases decided by the Supreme Court) revised Stokes' three-volume work, he deleted certain portions of Stokes' original that were damaging to the extreme separationist position. The somewhat sanitized new version offers a Jefferson more congenial to the liberal view of separation which has now attained the status of officially established myth. For example, Pfeffer omits from his revision Stokes' conclusion that (contrary to the modern fiction about Jefferson)

"even in establishing a quasi-state university on broad lines, the greatest liberal who took part in the founding of our government felt that instruction in the fundamentals of Christian Theism and Christian worship were both *important and proper*." (Emphasis added.) He also deletes the observation by Stokes that Jefferson acknowledged the lack of credal instruction as a "chasm" at the university. (Compare Stokes, *supra*, I:337-38, with Pfeffer's revision [1964], 54.) Calling Pfeffer "perhaps the most prominent contemporary Church-State scholar and legal activist who embraces the broad interpretation of the Establishment Clause," Prof. Robert L. Cord comments about another book of Pfeffer, *Church, State and Freedom*, (1953, revised 1967): "While much of Pfeffer's research appears sound, the two most important chapters of this book ... contain some clear historical errors regarding separation of Church and State in the United States. Worse still is that Pfeffer draws some major conclusion from statements which are factually erroneous.... Other statements made in [the book] are not easily reconciled with historical fact.... Unfortunately, some of [Pfeffer's] conclusions, which are, in my opinion, incompatible with a broader look at American primary historical documents, have been embraced by other scholars and by some of our nation's most important jurists." "The Myth of Separation: Understanding the First Amendment," *National Review*, January 22, 1982, 30-32.

51. Cornelison, *supra*, 93.

52. Cord, *Separation of Church and State*, *supra*, 19 ff., and Cord, "The Myth of Separation," *supra*, 26 ff.

53 *Schempp*, 225.

54. *Schempp*, 313 (Stewart, J., Dissenting).

Professor Charles Rice points out that "the fallacy of the Supreme Court's 'neutrality' concept is that it is impossible for the government to maintain neutrality as between theistic and non-theistic religions without implicitly establishing an agnostic position. Agnosticism, however, is a non-theistic belief. The choice, then, is not, as the Court and its apologists have said, between 'neutrality' and government encouragement of theism. The choice is between government encouragement of theism and government encouragement of agnosticism." Rice, "The Prayer Amendment: A Justification," 24 *S.C. L. Rev.* 705, 715 (1972). Cited in Justice Department analysis, *supra*.

55. *Torcaso v. Watkins*, 367 U.S. at 495 (1961).

56. *National Review*, June 25, 1982, 788.

57. *Documents of American History*, *supra*, 128 ff. Article I of the Northwest Ordinance spells out the Founders' understanding of religious liberty as freedom from oppression, not as freedom from religious influence or from state encouragement of religion: "No person demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments, in the said territory."

58. Justice Department's analysis of President Reagan's proposed amendment, *supra*, 5 f.

59. Raymond B. Culver, *Horace Mann and Religion in the Massachusetts Public Schools*, New Haven: 1929, 235.

60. See above in this Backgrounder, p. II-138.

61. 343 U.S. 306, 313 (1952). There are many other examples of Supreme Court acknowledgment of our religious heritage. For example, in Holy Trinity Church v. U.S., 143 U.S. 465 (1982), the Supreme Court said: "this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation."

* * * * * * *

Jack Klenk
October 8, 1982

Senator HATCH. Mr. Jarmin, if you can move those mikes over there, I think that would be good.

STATEMENT OF GARY L. JARMIN

Mr. JARMIN. Thank you for inviting me today, Mr. Chairman. I would like to confine my remarks to a few of the key objections that some of the opponents of school prayer have raised and address those.

Although my written testimony does address the problem of the establishment clause in the first amendment, I think there has been sufficient testimony to show that the ultimate purpose of that was to prevent the establishment of a national church and not to completely segregate all religious activity from public life.

However, there is one very interesting comment I would like to make. And I believe that this entire belief that the establishment clause was meant to preclude all kinds of religious activity is really a complete case of constitutional revisionism, and, in fact, this constitutional revisionism is essentially based on an attitude by the court which did not, in its opinions, bother to go back and research carefully the historical evidence surrounding the debate of the first amendment.

And, in fact, it was interesting that one admirer of Chief Justice Earl Warren, Prof. Fred Rodell of Yale, in 1966 in an article in the New York Times praised Warren as being a Supreme Court Justice who, "brushed off pedantic impediments to the results he felt were right. He was not a look-it-up-in-the-library intellectual and was almost unique in his offhand dismissal of legal and historical research from both sides and in his pragmatic dependence upon present-day results."

And Rodell concludes in his article, "Warren was quite unworried that legislative history dug from a library might not support his reading."

Well, it is obviously this ignorance is bliss mentality of the earlier courts which I think led to this problem of trying to say that prayer in schools was somehow the establishment of religion.

However, I would like to move on to some other key arguments that we think are relevant to this issue. First of all, we think the real issue is not the establishment clause at all, but the free exercise clause. And when you are saying you cannot have group prayer or individual prayer, then you are essentially limiting the free exercise of religion, and especially when you have cases like in Lubbock where students could not even meet after school, this is clearly unconstitutional prevention of the free exercise of religion.

Clearly, two or three cannot gather in His name in many schools. Now, we believe current judicial decrees are in direct violation to students' rights to the free exercise of religion. While it is true that any student may take a few moments and offer a silent prayer to God any time during the school day, this is no more a "right" than that shared by the students in the Soviet Union.

As President Reagan has stated, "Public expressions of prayer should have more legitimacy in the United States than that which exists in an officially atheistic and totalitarian country."

Not only is the prevention of prayer in public schools an unconstitutional infringement against the free exercise of religion and free speech, it is equally hypocritical. Opponents of school prayer are fond of the Voltarian principle to "defend to the death one's right to say anything" no matter how much they may disagree with it.

Unfortunately, it seems this principle does not apply when the content of the speech is religious.

And we wonder why the ACLU and others are so determined to defend the platitudes of Marxism being freely expressed in our public schools while viciously opposing any reference to God. It appears to me that these people are really ushering in a new form of bigotry. It is basically saying anything can be said except that which is a religious sentiment. Then, that is not good.

Now, they have also tried to create some new ideas about what is constitutional, about what the first amendment means and create, I think, some new constitutional rights; namely, that a person has the right to be protected from even being in the presence of a religious sentiment being said. Their argument goes a little bit like this: public school attendance is compulsory; therefore, a child is either, A, forced to be in the presence of a prayer being said, or B, is subjected to peer pressure to participate even if they do not wish to, or C, is embarrassed if they choose to walk out of the room while the prayer is being recited.

Well, first of all, there is nothing in the first amendment that suggests that a person has a constitutional right from being exposed to a religious sentiment. Now, assuming this line of reasoning is correct, one could conclude that it is unconstitutional for a person to have to use currency inscribed with the motto, "In God We Trust." After all, it is compulsory for someone to have to use the legal tender of the United States, at least in this country, if they are going to do any business. And I am sure Madelyn Murray O'Hair is not too enthralled with the fact she has to carry around bank notes saying "In God We Trust" on them.

But, if you follow this line of reasoning, then it should be unconstitutional for "In God We Trust" to be on the back of a dollar bill. This is sort of, I think, an inane argument. The first amendment was intended to protect freedom for religion, not freedom from religion.

Now, the state of neutrality argument is, of course, a myth. We have abolished almost all forms of religious sentiment being expressed in public schools. And yet, we have an enormous amount of other doctrines being taught, humanist doctrines being taught. Christian students, as my colleague here, Dick Dingman, pointed out, are forced to have to listen to all kinds of things which would offend their religious views, whether it is the theory of evolution, whether it is sex education that teaches gay is OK, and things of this nature; so Christian students are forced to listen to all kinds of humanist banalities behind uttered.

But the minute they are asked for 1 minute out of 360 minutes in a schoolday to say a prayer, of course, then immediately, this is terrible and this is unconstitutional, according to the opponents.

But about peer pressure, I think this is very important. I think, at best, the argument is overstated, and at worst, it is a rather specious one.

Let us take the case of Jehovah Witnesses. They won the challenge in the courts to be prevented from having their children say the Pledge of Allegiance at the beginning of the school day for religious reasons. OK. In the beginning of the schoolday they do not have to do this. And their children just simply remain silent. Well, the question is: Do we hear a hue and cry throughout the land from parents of Jehovah Witnesses complaining about their children being subjected to peer pressure and embarrassment? No, of course we do not.

And I think that this similar principle would apply if simply children do not have to participate and if they do not wish to, and I doubt that we will find that the results will be any different than that we have found with the case of the Jehovah Witnesses.

But also on the peer pressure argument, children are subjected to enormous kinds of peer pressures in school, most of them negative, to involve in premarital sex and drug and alcohol abuse, and a host of other immoral activities.

And yet—our opponents suggest that children—the child being exposed to a prayer would somehow be the worst thing that could happen to them. Well, I can assure you that a massive wave of piety is hardly the "in thing" engulfing our public schools these days. But we believe that no one is going to hardly in any way be harmed by being in the presence of hearing a prayer uttered.

In fact, I would like the other side to prove that they have examples of enormous psychological harm that has occurred to children because of this. I do not think they could.

But my final point I would like to talk about is tolerance. It is interesting that we constantly hear opponents of school prayer very often preaching about tolerance. However, this seems to apply to everybody except believers. We are asked to be tolerant and openminded to almost every new, modern thought that exists.

Well, at least we can all agree that it is highly desirable for people to be tolerant of different religious beliefs, and that religious bigotry and prejudice has no place in our society. We would all agree with that. Likewise, it should not be too much to ask for atheists and agnostics to demonstrate the same attitude toward believers. Prohibition of school prayer is demonstrating official sanction of intolerance toward believers.

Converely, the restoration of school prayer will hopefully have the desirable consequence of restoring an attitude of tolerance and respect for those who worship God by those who do not.

I will conclude my statement at this time, Mr. Chairman.

[The prepared statement of Gary L. Jarmin follows:]

PREPARED STATEMENT OF GARY L. JARMIN

Mr Chairman and other distinguished members of the Senate Subcommittee on the Constitutional, I thank you for the opportunity to appear today to testify on S.J. Res. 73, which would restore the right of voluntary prayer in our nation's public schools. I submit my testimony on behalf of two organizations: (1) Christian Voice, a national lobby with a membership of over 300,000 evangelical Christians, including more than 40,000 ministers representing approximately 47 different denominations and independent churches; and (2) the Project Prayer Coalition, for which I serve as

Co-Chairman, an ad-hoc coalition representing 126 national organizations and leaders in support of S.J. Res. 73. We enthusiastically endorse the school prayer amendment initiated by President Reagan and we congratulate the President for his leadership and commitment to restoring voluntary prayer in public schools.

My testimony will primarily address some of the key arguments opponents of this proposed Constitutional Amendment have made and, in conclusion, will suggest alternative language which we believe overcomes some of the most serious objections to S.J. Res. 73 while accomplishing the goal of restoring voluntary prayer in public schools.

ESTABLISHMENT OF RELIGION

The key argument which needs to be most clearly exposed as fraudulent is the proposition that prayer in public schools is an unconstitutional "establishment of religion".

We believe this assumption is a classic case of constitutional revisionism which ignores the true meaning of the First Amendment clause and the intent of our Founding Fathers on drafting this Amendment. This is glaringly evident when considering the opinions of the Court which tried to justify its holdings, that school prayers violated the establishment clause of the First Amendment, never went to the sources of the Constitution to find the true meaning of this important clause.

This negligence by the court is accurately described in a document prepared by Hermine Herta Meyer, formerly an attorney with the Department of justice, which was prepared as an amicus curiae brief in the cast of *Treen v. Karen B.* [1]

The brief states:

The debates in the First Congress leave no doubt as to the meaning and purpose of the religion clause. Its first version was introduced to the House by Madison on June 8, 1789, as follows:

"The civil rights of none shall be abridged on account of religious belief or worship, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." (1 Annals of Cong. 434).

The amendment was referred to a committee of eleven which reprorted back the following version:

"No religion shall be established by law nor shall the equal rights of conscience be infringed." (id 729)

It was considered by the House on August 15, 1789, acting as a Committee of the Whole. Mr. Sylvester objected to it.

"He apprehended that it was liable to a construction different from what had been made by the committee. He feared it might be thought to have a tendency to abolish religion altogether." (Id.)

Mr. Gerry said,

"It would read better if it was, that no religious doctrine shall be established by law." (Id. 730).

Mr. Sherman thought the amendment unnecessary because Congress had no authority whatever delegated to it by the Constitution to make religious establishments.

Madison then said:

"He apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the Constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the Constitution, and the laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience, and establish a national religion; to prevent these effects he presumed the amendment was intended, and he thought it as well expressed as the nature of the language would admit." (Id.730).

Mr. Huntington feared, "that the words might be taken in such latitude as to be extremely hurtful to the cause of religion." For instance, "a support of ministers or building of places of worship might be construed into a religious establishment." "He hoped, therefore, the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all." (Id. 730–731).

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[1] This brief could not be filed because on January 25, 1982, the Supreme court summarily affirmed the judgement of the U.S. Fifth Circuit Court of Appeals which held the Louisiana Law, La. R.S. 17:2115, unconstitutional.

Madison then suggested to insert the word "national" before religion.

"He believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought if the word "national" was introduced, it would point the amendment directly to the object it was intended to prevent." (Id. 731).

But there was objection to the word "national". The reason is explained by what happened at the Federal Convention of 1787. The so-called Virginia Plan, on the basis of which the Convention began its work, had proposed to establish a "national government", and to make the laws of the States dependent on the approval of the National Legislature and a Council of Revision composed of the National Executive and judges of the National Supreme Court. In short, the Virginia Plan would have reduced the proud States to little more than administrative provinces. (1 Farrand 20–23).

When the delegates of some States woke up to what was happening, Mr. Patterson of New Jersey submitted to the Convention the so-called New Jersey Plan which proposed to delegate to "the United States in Congress" additional enumerated powers, and under which the States would retain full power to make laws in all matters not delegated to "the United States in Congress," without any control by any central authority. (Id. 242–245).

While the new Constitution did create a central government, it left, however, to the States a residual sovereignty free from any federal control. In order to indicate that the new government was to be a "federal" and not a "national" government, the word "national" was removed from the final constitutional plan and replaced with "the United States." (Id. 334–335).

This hatred of the word "national" made its apperarance in the First Congress and influenced the religion clause. This was unfortunate, because Madison's suggestion, "no national religion shall be established by law," expressed much clearer what the States intended to prevent, than the clause which finally went into the Constitution, viz.:

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

It was adopted by the House on September 24, 1789, by the Senate on September 25, 1789. (1 Annals of Cong. 913).

During the entire debates, not one word was said which might have indicated that the Framers intended to provide for a separation of State and church. On the contrary, when the version was suggested: "no religion shall be established by law," it was immediately objected to because "it might be thought to have a tendency to abolish religion." (1 Annals of Cong. 729). Furthermore, the fact that the same First Congress that drafted the First Amendment with its religion clause appointed two Chaplains of different denominations, one in April 1789 for the Senate, one in May 1789 for the House (1 Annals of Cong. 18, 19, 24, 233), and empowered the President to appoint a Chaplain for the Military Establishment and provided for his payment (First Cong., 3d Sess., Ch. 28, Secs. 5 and 6, 1 Stat. 223, March 23, 1791), ought to dispel any idea that Congress intended to forbid "every form of public aid or support for religion," as the Supreme Court said, (374 U.S., at 217).

From the foregoing, it ought to be clear that "establishment of religion" was merely a replacement for "national church" which could not be used because the word "national" had become anathema for people anxious to preserve the federal system. It is also clear that the First Amendment was requested by the States and that the purpose of its religion clause was to make sure that the federal government would not interfere with the States in matters of religion (end of brief).

As Dr. Meyer has correctly observed, any objective analysis of the debate by the framers of the Constitution clearly indicates that their purpose was to prevent the establishment of a "national church", not the complete segregation of religious activity from public life.

Further evidence of this lack of historical perspective is provided by an admirer of Chief Justice Earl Warren (1953–1969), under whose Court most of the key decisions affecting school prayer were made. In a 1966 article for the *New York Times*, law professor Fred Rodell of Yale praised Warren for being a Supreme Court Justice who "brushed off pedantic impediments to the results he felt were right." He was not a "look-it-up-in-the-library" intellectual, and was "almost unique" in his "offhand" dismissal of legal and historical research from both sides and in [his] pragamtic dependence on the present day results . . .". Rodell concludes, "Warren was quite unworried that legislative history, dug from a library might not support his reading." Thus, the ignorance-is-bliss mentality of the Court set the foundation for the so-called modern day revisionist interpretation of the First Amendment.

Even if one were to assume that the Court's reasoning was correct, taken to its logical extreme any reference to or acknowledgement of God should be eliminated from public life. The chaplains in the Congress or even the military would be unconstitutional and therefore have to be abolished. American coinage engraved with "In God we Trust" would be unconstitutional and therefore have to be changed. Ironically, the very body that has outlawed voluntary school prayer, the Supreme Court, continues to begin each session with a prayer, yet this practice too would have to be stopped because it also would be unconstitutional.

Proponents of this revisionist interpretation are also fond of quoting Thomas Jefferson's "wall of separation of church and state" as high and impregnable to justify their position. But, while Jefferson's statement is "a powerful way of summarizing the effect of the First amendment, it is clearly neither a complete statement nor a substitute for the words of amendment itself". GRISWOLD, "Absolute is in the Dark—A Discussion of the Approach of the Supreme Court to Constitutional Questions," 8 Utah L. Rev. 167, 174 (1963).

Jefferson correctly understood that this "wall of separation" was limited only to the Federal government's infringement on the free exercise of religion and to prevent the establishment of a national church. In his second Inaugural Address, Jefferson said, "In matters of religion I have considered that its free exercise is placed by the Constitution independent of the powers of General (federal) government. I have therefore undertaken on no occasion to prescribe the religious exercises suited to it, but have left them, as the Constitution found them, under the direction and discipline of the church or state authorities acknowledged by the several religious societies."

Moreover, those who use Jefferson's statement so often to argue against school prayer, totally ingnore that he did not favor the exclusion of religious education from public schools. Jefferson was instrumental in the adoption of the Regulations of October 4, 1824, of the University of Virginia, a State University which he founded, to extend invitations to the religious sects of the State to establish schools for religious instruction "within or adjacent to the precincts of the University." 3 Randall, "Life of Thomas Jefferson" (1858), 471. He commented in a letter to Dr. Thomas Cooper, of November 2, 1822:

"by bringing the sects together, and mixing them with the mass of other students, we shall soften their asperities, liberalize and neutralize their prejudices, and make the general religion a religion of peace, reason and morality." 12 Ford, The Works of Thomas Jefferson (Fed. ed. 1905) 272.

Disallowing prayer is an unconstitutional infringement on the free exercise of religion.

Opponents to school prayer focus their attention on the establishment clause issue, but the real issue at the heart of the school prayer Amendment is the issue of the right to the free exercise of religion. Since 1947, the Supreme Court decisions have overshadowed this issue. Today it is illegal for students to say grace before meals at school. Federal courts have ruled it is illegal to organize or participate in a voluntary school prayer group that meets during non-instructional periods on school premises. Clearly two or three cannot gather in His Name. Current judicial decrees are in direct violation of students' rights to the free exercise of religion. While it is true that any student may take a few moments and offer a silent prayer to God any time during the school day, this no more a "right" than that shared by the students in the Soviet Union.

As President Reagan has stated, "public expressions of prayer should have more legitimacy in the United States than that which exists in an officially atheistic and totalitarian country."

Not only is the prevention of prayer in public schools an unconstitutional infringement against the free exercise of religion and free speech, it is equally hypocritical. Opponents of school prayer are fond of the Voltarian principle to "defend to the death" one's right to say anything no matter how much we may disagree. Unfortunately, that principle appears not to apply when the content of the speech is religious. We wonder why the ACLU and others are so determined to defend platitudes of Marxism being freely expressed in our public schools while viciously opposing any reference to God? It appears to us that these people are ushering in a new form of bigotry. All is allowed to be spoken, unless you are a believer wishing to acknowledge God. Marx is okay, but God is not. It is indeed a good thing that the ACLU did not exist at the time the Declaration of Independence was ratified by the Continental Congress for it most assuredly would have been offended by the language acknowledging our "inalienable rights" are endowed by our Creator.

FREEDOM FROM RELIGION

In addition to their gross misinterpretation of the establishment clause school prayer opponents also tried to invent an entirely new constitutional right: namely, that one has the right to be protected from being "forced" to hear a prayer or any religious reference to God. Their argument goes something like this:

Public school attendance is compulsory, therefore, a child is either: (a) forced to be in the presence of a prayer being said; or (b) is subjected to peer pressure to participate (even if they don't wish to); or (c) embarassed if they choose to walk out of the room while the prayer is being recited.

This argument falls apart on a number of counts:

First, as previously explained the purpose of the First Amendment was to protect people from being subjected to a national church and to guarantee total freedom of religious expression. There is nothing in the First Amendment to suggest that a person has a constitutional right from being "exposed" to a religious sentiment. Assuming this line of reasoning is correct, one could conclude that it is unconstitutional for a person to have to use currency inscribed with the motto "In God We Trust". After all, it is compulsory for one to use the United States' legal tender as means of exchange. I'm certain Madeline Murray O'Hair doesn't particularly like the fact she must use and carry in her wallet currency engraved with a religious expression. The First Amendment was intended to protect freedom for religion, not freedom from religion.

Second, this argument implies that a state of "neutrality" must exist—that the State should not show preference for or against religion. The neutrality argument is a myth. By not allowing religious expression the State is directly demonstrating a bias for a humanist doctrine as opposed to a religious doctrine. Justice Tom Clark in the Supreme Court's 1963 Bible-reading decision stated that "the State may not establish a 'religion of secularism' in the sense of affirmatively showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe'." However, by prohibiting religious expression in the classroom, the Supreme Court is stating that the "rights" of nonbelievers take precedence over those who do believe. This is not neutrality, but simply discrimination against those who believe in God.

Dir Walter Moberly in "The Crisis in the University" comments on the religiously "neutral" British universities:

"On the fundamental religious issue, the modern university tends to be, and supposes it is, neutral, but it is not. Certainly it neither inculcates nor expressly repudiates belief in God. But it does what is far more deadly than open rejection; it ignores Him. . . . It is in this sense that the university today is atheistic. . . . It is a fallacy to suppose they by omiting a subject you teach nothing about it. On the contrary, you teach that it is to be omitted, and that it is therefore a matter of secondary importance. And you teach this not openly and explicitly, which would invite criticism; you simply take it for granted and thereby insinuate it silently, insidiously, and all but irresistibly.

Finally, the lamentations about "peer pressure" or "embarassment" are at best, overstated and, at worst, specious. The case of Jehovah's Witnesses not having to say the pledge of allegiance is a good example. Adherents of this faith simply remain silent while their fellow students recite this oath. Do we hear a hue and cry throughout the land by their parents protesting "peer pressure" or "embarassment"? Of course, we don't. And it is terribly unlikely the results will be any different once group prayer is allowed.

Were the issue of prayer not so serious, the argument by those who fear "peer pressure" is almost laughable. They seem to suggest that the worst fate that could befall a child in public schools is to be "pressured" to demonstrate an attitude of reverence for God. This would have a devastating impact emotionally and psychologically on the child they contend. What they ignore is that school children are constantly subjected to a myriad of pressures by their peers—most of them negative.

Children are being forever pressured to have pre-marital sex, engage in drug, alcohol abuse, and a plethora of other immoral and illegal activities. (A massive wave of piety is hardly the "in thing" engulfing our public schools these days). Yet, to suggest taking one minute to pray would somehow do severe damage to the sensitive psyche of a young child is about as inane an argument as has ever been uttered. There is no convincing evidence to prove that anyone has ever been "harmed' by being in the presence of prayer.

In fact, being in the presence of prayer could have the very positive effect of inculcating religious tolerance on the part of a non-believer. It is amusing to observe the constant preaching of liberals in favor of "tolerance" except when it applies to believers. These days we are constantly asked to be "tolerant" and "open minded" to almost every humanist banality which exists. We can all agree, at least, that it is highly desirable for people to be tolerant of differing religious beliefs and that religious bigotry and prejudice have no place in our society. We couldn't agree more. Likewise, it should not be too much to ask for atheists and agnostics to demonstrate the same attitude towards believers. Prohibition of school prayer is demonstrating officially sanctional intolerance towards believers. Conversely, the restoration of school prayer will, hopefully, have the desirable consequence of restoring an atmosphere of tolerance and respect for those who worship God by those who do not.

ROTE PRAYER IS MEANINGLESS

Some opponents argue that school prayer is not desirable because the prayer (in order to not be offensive) will likely be a watered down, compromise prayer which is meaningless. Therefore, better no prayer at all. They also state it is not the business of schools to instruct children in how to pray. This argument, however, totally ignores the real value and purpose of prayer in schools.

We would agree that the school is not the place where one should be taught to pray. This should be done in the home and church. But the purpose of school prayer is not to teach children how to pray, or what is a meaningful prayer. The purpose of school prayer is to reinforce an attitude of reverence for God and to invoke His guidance during the school day. Consequently, the prayer offered does not necessarily have to be deep and spiritually uplifting to accomplish this goal.

Establishing an attitude of reverence or piety is the real issue. In addition to academic learning, public school education also helps to reinforce basic values that we in society share and wish to see inculcated in our children. Discipline and respect for authority, for example, are values which virtually every parent wishes to see encouraged in our public schools. Discipline and respect for authority are imperative in creating the necessary environment training conducive for learning. Likewise, reverence for God is another widely shared value which the vast majority of parents wish to see acknowledged and reinforced in our schools.

It is the act of supplication to God which fulfills this highly desired value. Whether it is accomplished by a rote or "meaningful" prayer is not ultimately important. Even reduced to its most common denominator, any prayer, i.e., acknowledgment of God and that He does rule in our lives, provides a valuable and positive motivation of conscience. Especially when the philosophy of the education establishment is overwhelmed by instruction in humanist precepts, the act of prayer offers a counterweight balance and reinforcement of spiritual values.

In conclusion, we believe one of the most important reasons for restoring school prayer is because the people want it. Nationwide Gallup Polls in 1974 and 1980 showed that 77 and 76 percent respectively of those surveyed favored the return of prayers in public schools (Washington Post, May 16, 1980). For over 20 years the American poeple have been waiting for Congress to remedy this problem. We hope the Congress will act with dispatch to favorably adopt S.J. Res. 73.

Senator HATCH. Thank you so much. Let me just ask all three of you how do you respond to the suggestion that has been made in front of our committee on this particular issue that religion belongs solely in the church and in the home and should not be in the schools?

Mr. Dingman.

Mr. DINGMAN. Senator, I would say that, first of all, the total absence of religion would be the imposition of religion. It would be the imposition of the humanistic religion. And so it is virtually impossible to be totally value free and religious value free.

Certainly, there are many things that should be done in the home and in the church. And again I would go back to the example that in the matter of sex education, they say that is not being done in the home; therefore, we have to do it in the schools. Well, we would encourage it to be done in the home.

And certainly it ought to be done there. I would not use that as the argument for saying it has to be done in the school because it is not being done in the home. But certainly there should be no prohibition from those who wish to voluntarily assemble. And it is important that we remember that a classroom moment of prayer is not the sole issue here, as has been addressed very widely; we are talking about the fact that it also prohibits under current law and practice the voluntary assembling of students together after school for extracurricular Bible study purposes, and for groups that wish to bow and ask the blessing over their lunch.

There are a number of other ramifications of this. So certainly it ought to be done in the home, but it should not be banned from the school.

Mr. DUGAN. Mr. Chairman, my response to that, if you are seeking answers from several of us, is that essentially the founding fathers of our Nation did not envision limiting the practice of religion to the homes and churches. Their reference to a divine providence and prayers for their deliberations, as the early Congresses, and so forth, are an indication of that.

Perhaps we need a different perspective from overseas from one who now lives in this Nation. Aleksandr Solzhenitsyn a month or two ago said that when prayers in school are forbidden, even in a free country, it is not much more tolerable than in Communist countries, only that it lacks the hammering in of atheism.

When someone like an Aleksandr Solzhenitsyn simply cannot grasp those gymnastics which have put us in a situation where we are forbidden the free exercise of religion to our students, then it is a pretty serious question in my view.

Senator HATCH. That is very interesting. Who would compose the school prayer under Senate Joint Resolution 73, in your opinion, and do you have any concerns that we would end up with an official, State approved, and authorized prayer that has been stripped of any significant meaning for the devout student?

Mr. JARMIN. I would like to make a comment on that. First of all, I do not think that the arguments by some who have testified that the State has no right to compose a prayer is correct. I think they are wrong. I think constitutionally the State does have the right to engage in composing prayers, and anything else.

I mean, if you take that argument to its logical conclusion, Reverend Halverson, the chaplain of the Senate, is an agent of the State—it would be unconstitutional for him to compose a prayer before the Senate.

If you take that argument to its logical conclusion, the President cannot issue a decree on a proclamation of prayer day, which is going to happen this Thursday. Now—and I could list many, many other examples. And you have chaplains in State legislatures all over the country composing prayers every day. They are indeed agents of the State.

So, I think they are on weak ground. In fact, I think they are on totally false ground to argue that an agent of the State cannot draft a prayer. The question is: is it desirable? Now, in that case, I would argue that I do not think it is desirable for the State legislature or the executive branch of a State to be in the business of drafting prayers, although I do think it is totally correct and proper for a local school district to do that. In most cases, probably what they will do is compose an interfaith commission to come up with a prayer and have that prayer offered in the classroom.

So I do not think it is unconstitutional for that to happen, but it is desirable that it be done at the local level, not at the State level, in my opinion. Also, if you have a State prescribed prayer, I also object to it on one other ground, because it does not take into account the different religious mix within the State school districts.

For example, in Beverly Hills they may want to say one kind of prayer and in Barstow, CA, a different kind. One school district might prefer silent prayer, another school district vocal prayer. One school district may want to have prayer and another may not want to have it at all. So I think these decisions should be left to the local level. And I think I have enough faith in the judgment and the wisdom and the tolerance of the people at that level to make those judgments.

So I would argue that while the State has that right, I would eliminate it at least at the State level and leave that up to the local school boards.

Senator HATCH. How would you all respond to the charge that voluntary school prayer can never be truly voluntary because of peer pressure among school children?

Mr. DUGAN. Mr. Chairman, what we support is student initiated prayer, and that is voluntary in the most literal sense of the word. And in relation to the last question, we did testify—I personally did last July before the Senate Judiciary Committee, expressing concern about the State composing a common denominator kind of prayer. It was our suggestion at that time, and we stand by it, that the proposed constitutional amendment be modified to narrow it in this sense, that the State shall not influence the form or content of any prayer. We are talking about schools; we are not talking about chaplaincies of legislatures or the U.S. Congress, but in reference to schools particularly.

So we have expressed that kind of concern already. But we are supporting student-initiated prayer and other religious activity in our quest for equal access and the protection of religious free speech, and so on.

Mr. DINGMAN. Senator, two points: one is that we must remember that we are not talking about just classroom prayer. The phrase that is easy to get lost in the dialog is "and other religious activities," as we have described at some length. So let us not——

Senator HATCH. Are you talking about equal access also?

Mr. DINGMAN. That is correct. That is correct. Now, I personally would not favor a prescribed prayer by anyone, whether it be county, State, Federal, anyone, because that to me seriously diminishes the value of the prayer. Now, I realize that we have a commonly used Lord's Prayer. That is fine. I have no objection for those who want to use it. But I would say that a mandated prayer would be totally inappropriate, and I would hope that it would be left to the local jurisdictions to decide how they are going to handle the matter.

Now, as you know better than I, the proposed constitutional amendment does not prescribe or proscribe. It simply says that the Constitution does not ban prayer. And, therefore, it would be left up to other levels of jurisdiction to decide how to handle it.

And I would be happy to rely upon the wisdom of the local electorate to decide with their school board elections, et cetera, how they wish to handle it locally. And whether I choose the particular form that they would choose is irrelevant. If it reflects the local wishes, then I would yield to that. And certainly I have been in situations throughout my life where perhaps my viewpoint may have been a minority viewpoint, but that did not distort me, nor do I think that it distorts others to be in the presence of a viewpoint which they do not particularly share.

Senator HATCH. In dealing with the Lubbock situation, that issue, whether it be by constitutional amendment or by statute, which would you think would be the best approach: to require local school districts to provide equal access to religious and nonreligious extracurricular activities, or simply to make clear that nothing in the Constitution prohibits school districts from adopting this policy if they desire to adopt it?

Now, if this is a true issue of free exercise, should it be mandatory or should it be voluntary? If it is a true issue of free exercise, I would imagine that the policy ought to be mandatory.

On the other hand, if we are primarily concerned with local control, it probably ought to be optional. So I would like to hear your viewpoints with regard to that.

Mr. DUGAN. Mr. Chairman, might I ask if we could have permission for our counsel, Forest Montgomery, who is a member of the bar of the Supreme Court and who filed a friend of the court brief for NAE and the Christian Legal Society and some other organizations in the *Lubbock* case, to comment on this.

Senator HATCH. We would be glad to have that comment.

Mr. MONTGOMERY. Thank you, Mr. Chairman. I would say that believing as I do in local control of educational matters, that it ought to be left to the option of the States.

May I share with this committee a general impression I have of both the equal access hearings and the hearing on the President's initiative here today. Let me say that I share some of the concern of those who object to the President's amendment and the equal access approach. When I was in the sixth grade in elementary school, we used to say the Lord's Prayer. And looking back on it, I can see that that was very insensitive in so far as a Jewish student might have been present in the class. I do not even know. I was insensitive to that circumstance. So were the school officials.

I think we do need to be concerned about the sensitivity of the students. But it seems to me that those who object to the President's initiative, and the equal access proposed legislation of both Senators Denton and Hatfield, are saying to the Congress or saying to this committee—you are confronted with a problem that defies solution.

They are wholly negative in their testimony. I have heard every conceivable objection, but there is nothing constructive about their testimony. I do not mean to single out the testimony that you are going to hear from the bar of the city of New York, but I consider it symptomatic of the problem. In a statement of 53 pages and 141 footnotes, they devote one sentence to the *Brandon* and *Lubbock* cases and an accompanying footnote.

They do not even discuss Tinker against Des Moines, in which the Supreme Court recognized that high school students enjoy constitutional rights, including free speech and religious speech.

It just seems to me that American ingenuity would not be overly taxed if we were to work together to try and formulate some sort of relief for the present situation, because as matters stand today, a lot of students who would like to share with one another religious expression are being denied that opportunity.

If a school makes its facilities available for student groups–and I do not consider making physical facilities available the functional equivalent of state sponsorship–it seems to me that in that situation all groups, regardless of the ideas they are expressing, should have an equal opportunity.

And just as the political remarks of the student endorsing socialism or communism does not mean that those remarks are sponsored by the school, so to me it seems that both the parents and the students ought to be able to appreciate the difference between student-initiated activity and activities sponsored by a school.

Senator HATCH. Thank you so much.

Gentlemen, we appreciate you taking time to appear before the committee. We may submit some additional questions to you. We appreciate the excellent testimony you have given. And I appreciate personally the help you have given this subcommittee.

Our last panel is also made up of institutional representatives. We will begin with Mr. Dunn, James Dunn, the executive director of the Baptist Committee on Public Affairs. We will also hear from Ms. Gail Merel, representing the Bar Association of New York City. She obtained her doctorate at Harvard conducting research on the development of the first amendment. And our final witness, representing the National Education Association, which asked to testify this morning, is Bernie Freitag, a classroom teacher since 1961 and vice president of the association.

We are happy to have the three of you here, and we will begin with Mr. Dunn.

STATEMENTS OF JAMES M. DUNN, EXECUTIVE DIRECTOR, BAPTIST COMMITTEE ON PUBLIC AFFAIRS; GAIL MEREL, BAR ASSOCIATION OF NEW YORK CITY; AND BERNIE FREITAG, VICE PRESIDENT, NATIONAL EDUCATION ASSOCIATION

Mr. DUNN. Thank you, Mr. Chairman.

If it is possible, I would like for the full testimony, which has been submitted, to be entered into the record. And I will give you the 3-minute version.

Senator HATCH. Without objection, all of your prepared statements will be placed in the record.

Mr. DUNN. Thank you.

I am James Dunn, the executive director of the Baptist Joint Committee on Public Affairs. It is composed of representatives from eight national cooperating Baptist conventions and conferences in the United States with a current membership of over 27 million.

The committee seeks through a joint witness to apply the traditional Baptist concerns for religious liberty and proper church-state relations. For example, in March of 1982, the Baptist Joint Committee reaffirmed its opposition to all constitutional amendments dealing with prayer in the public schools.

And as recently as last fall, 12 major Baptist conventions explicitly rejected the President's appeal for an amendment to the Constitution which would sanction religious exercise. Kentucky Baptists said "The Constitution as it now stands offers ample protection. Prayer in the public schools would face so many legal battles"—some of them have been suggested here today—"that it would lose its significance and vitality."

Missouri Baptists expressed their opposition to "any effort of government to become involved in the writing of prayers or in the religious instruction of our children."

The Progressive National Baptist Convention, a black convention, said,

> "Whereas the phrase legislating voluntary prayer in public schools is a linguistic contradiction and a political and a religious Trojan horse, this convention records its opposition to efforts to place prayer in the public schools by whatever means.

The American Baptist Churches in the United States reiterated their strong opposition to religious exercises in the schools. However, because of the congregational autonomy of Baptist churches and democratic policy of Baptists, we do not purport to speak for all 27 million Baptists.

The first false premise about the need for a prayer amendment——

Senator HATCH. How many do you purport to speak for at this time?

Mr. DUNN. Well, at this moment, I speak for myself and 15 conventions which have taken strong action in oppostion——

Senator HATCH. That would be about how many Baptists? I do not mean to interrupt you, but I just——

Mr. DUNN. 20 million.

Senator HATCH. About 20 million.

Mr. DUNN. Yes, in those conventions that have taken strong action in opposition to the school prayer amendment.

Senator HATCH. I see, just so we know.

Mr. DUNN. The first false premise about the need for a prayer amendment is that the Supreme Court banned voluntary prayer. Prayer, to be true prayer, cannot be coerced. All true prayer is voluntary prayer.

The Court said government cannot write prayers or require students or teachers in public schools to be involved in oral or group prayers. Government may not sponsor religious exercises. The fact that students may be excused from those exercises does not eliminate the coercive element inherent in classes saying prayers.

Compulsory school attendance laws coercively provide all public schools with captive audiences. Mr. Justice Stevens was correct in calling public school prayers compelled ritual. Voluntary prayer was not at issue in the prayer cases and was not forbidden in the public schools. Prayer permits are not needed in this country.

The second false premise is that human beings, individually or through their government, have the power either to ban God from a public building or to adopt an amendment that will permit God to enter a place from which man has banned him.

Such a premise is not only false, but also borders on blasphemy. There is little doubt as to the administration's intent about the Government's role. In a briefing paper distributed by the White House, the administration in a question and answer format asked, "Will state governments or local school boards be free to compose their own prayers if this amendment is ratified?"

The administration's answer, "Yes. If groups of people are to be permitted to pray, someone must have the power to determine the content of such prayer."

"Permitted to pray"? "Determine the content of prayers"? What is voluntary about that? Such phrases strike at the very heart of religious liberty. And amendment to put God back in the schools is unnecesary, unsound, and dangerous. We urge this committee to oppose any such proposal.

[The following was received for the record:]

PREPARED STATEMENT OF JAMES M. DUNN

I am James M. Dunn, Executive Director of the Baptist Joint Committee on Public Affairs. The Baptist Joint Committee is composed of representatives from eight national cooperating Baptist conventions and conferences in the United States. These groups have a current membership of over 27 million.

The Committee seeks, through a joint witness, to apply the traditional Baptist concerns for religious liberty and proper church-state relations to present circumstances. For example, in March 1982 the Baptist Joint Committee reaffirmed its opposition to any and all constitutional amendments dealing with prayer in public schools; and as recently as last fall 10 major state Baptist conventions explicitly rejected the President's appeal for an amendment to the Constitution which would sanction religious exercises. However, because of the congregational autonomy of individual Baptist churches and the democratic polity of Baptists, we do not purport to speak for all Baptists.

President Reagan's proposed amendment to the Constitution of the United States: "Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any state to participate in prayer." seems innocuous enough, but simple words such as these can have a profound impact upon religious freedoms. It is important that we examine both the need for and the potential impact of such an amendment.

Mainline Protestant denominations and all major Jewish organizations have taken strong positions against a so-called prayer amendment. Why have these religious organizations opposed an amendment which, on the surface, appears to expand religious liberty? Their opposition has two major bases: (1) the arguments for a prayer amendment are based on false premises, and, (2) such an amendment could seriously limit religious liberty in the United States.

False premises: The first false premise about the need for a prayer amendment is that the Supreme Court in the prayer cases banned voluntary prayer from the public schools. Prayer, to be true prayer, cannot be coerced. Thus, all true prayer is voluntary prayer. The Court said: government cannot write prayers or require students or teachers in public schools to be involved in oral or group prayers. Government may not sponsor religious exercises; the fact that students may be excused from those exercises does not eliminate the coercive element inherent in classes saying prayers. Compulsory attendance laws provide all public schools with captive audiences. Mr. Justice Stevens was correct when he called public school prayers "compelled ritual." Voluntary prayer was not at issue in the prayer cases and was not forbidden in the public schools. Prayer permits are not necessary in this country.

The second false premise is that human beings, individually or through their government, have the power either to ban God from a public building or any other place or to adopt an amendment which will permit God to enter a place from which man has banned Him. Such a premise not only is false but also borders on blasphemy.

A third false premise is that the existence of state-approved oral prayers in some public schools for a number of years argues against the Court's decisions in Engel v. Vitale and Abington v. Schempp. Having noble reasons for doing the wrong thing does not make an action right. We had slavery in parts of this nation until the 1860's, but in hindsight we know that the institution of slavery was wrong. Government involvement in religious exercises was wrong when it was permitted, was wrong when the Court declared it unconstitutional, and is wrong now. As noble as the reasons for having government mandated or permitted prayers might have been, in terms of religious liberty they were wrong reasons supporting wrong practices.

Finally, those who argue for a prayer amendment assert a cause-and-effect relationship between the Engel and Schempp decisions and problems which have developed in public schools and in parent-child relationships. There is not a single bit of evidence to support such an argument. If one is to act simply on speculation, it would be just as valid to speculate that increased TV watching, ready access to automobiles, more family spendable income, the war in Vietnam, or even "men walking on the moon" was the cause of the problems. In fact, tearing religious exercises from their traditions and thrusting a watered-down prayer on public schools may constitute the ultimate secularization and create real disrespect for authority.

Religious liberty: The potential dangers to religious liberty posed by the adoption of the proposed amendment are numerous.

One must be aware of the net effect of adding this amendment to the Constitution. The "prayer in the public schools" decisions held that government constitutionally could not either permit, require, or participate in religious exercises because the establishment of religion clause of the First Amendment forbids it to do so. The amendment's proponents, in order to reinstitute government's role in prayer in the public schools, are thus advocating an amendment to the establishment of religion clause. Therein lies a major problem.

Through years of interpretation of the establishment clause of the First Amendment by the Supreme Court, a body of precedent has been developed which gives government and religious organizations guidelines for their proper relationships. Under the proposed amendment, as new litigation arises--and be certain that it will--these guidelines, which have given us a high degree of religious liberty with a minimum of church-state friction, will be "up for grabs." They could be altered to such a degree that new government intrusions into the affairs of churches would be legalized.

New words would be added to the Constitution by the amendment. These would have to be interpreted and defined by the courts. I am not anxious to have the courts define the nature and essence of "prayer." What is the extent of "other public institutions"? What makes a church or one of its agencies a "public institution"? Does tax exemption? If the amendment is to return us to the condition which existed in the schools before Engel and Schempp--i.e. a government role in prayer--what would be the government's role in prayer in these "public institutions"?

There is little doubt as to the Administration's intent about the government's role. In a briefing paper distributed by the White House when the proposed amendment language was first made public in May 1982, the Administration, in a Question and Answer format asked, "Will state governments or local school boards be free to compose their own prayers if this amendment is ratified?" The Administration's answer: "Yes...If groups of people are to be permitted to pray, someone must have the power to determine the content of such prayers." Permitted to pray? Determine the content of prayers? What is voluntary about that? Such phrases strike at the heart of religious liberty.

I have mentioned only a few of the religious liberty/constitutional questions which the proposed amendment raises. These questions should be sufficient to evoke caution among those who cherish religious liberty.

An amendment to "put God back in the schools" is unnecessary, unsound and dangerous. We urge this committee and the Congress to oppose any such proposal.

PRAYER IN PUBLIC SCHOOLS

WHEREAS the proper place of religion in public schools continues to be the subject of confusion among U. S. citizens, including our own Baptist people;

AND WHEREAS Congress continues to be pressured to act favorably on a proposed constitutional amendment calling for prayer in public schools;

AND WHEREAS Congress is likewise under severe pressure to pass bills seeking to remove challenges to state laws or local regulations returning prayer to public schools from the jurisdiction of federal courts;

AND WHEREAS the Baptist Joint Committee on Public Affairs has consistently supported the U. S. Supreme Court's historic 1962 and 1963 decisions striking down state-mandated prayer and Bible reading in public schools;

THEREFORE BE IT RESOLVED that the Baptist Joint Committee reaffirm its support of the Supreme Court's decisions;

BE IT FURTHER RESOLVED that the Baptist Joint Committee reassert its opposition to any and all proposed constitutional amendments which, under the guise of fostering "voluntary" prayer in public schools, would in fact undermine those decisions;

BE IT FURTHER RESOLVED that the Baptist Joint Committee oppose unalterably any and all legislative efforts to remove from federal court jurisdiction laws dealing with prayer in public schools;

BE IT FURTHER RESOLVED that we recommit the Baptist Joint Committee to exercise a leadership role in the effort to defeat constitutional amendments and jurisdictional bills dealing with prayer in public schools in Congress while at the same time asking Baptist leaders across the country to join us in seeking the defeat of such measures by communicating their opposition to members of the U. S. Senate and House of Representatives;

BE IT FURTHER RESOLVED that we call upon our denominational leaders to undertake a renewed effort to provide information to our Baptist people about the constitutionally appropriate place of religion in public schools and to educate our people about the dangers of any form of coerced religious exercises in said schools; and

BE IT FURTHER RESOLVED that we seek the widest possible distribution of the newly reprinted pamphlet, "Religion in the Public School Classroom" as one means of attaining the above-stated objective.

Adopted March 2, 1982

. . . ironic that folks who quake at the
danger of secular humanism are
the very ones pushing for prayer in
public schools, an ultimate secularization . . .

REFLECTIONS

James M. Dunn
Executive Director

Words carry a peculiar freight, trigger a reaction in specific settings. The "school prayer" debate involves some odd words, 4 to 7 syllables long.

Consider *secularization:* simply to transfer from ecclesiastical to civil use. More precisely, to make secular: "that which is of or relating to the worldly or temporal as distinguished from the spiritual or eternal."

Secularization is exactly what would happen to prayer if some folks had their way. The most intimate and inner expression in religion would be drafted, conscripted, and dragged from its rightful setting where it is tenderly taught and spiritually shared. Prayer would be put into uniform and forced to do civil duty, to tote the values of the common culture, to bear the burdens of pop religion.

Prayer, as in "school prayer," is a component of civil religion. It is of necessity watered down. Whether prescribed by some level of authority like the teacher on the beat or the spontaneous outbursts of self-anointed spiritually superior students, it's watered down worship. There is something cheap about making prayer come under civil service, used to "quiet the kids down."

Isn't it ironic that folks who quake at the danger of secular humanism are the very ones pushing for prayer in the public schools, an ultimate secularization?

Consider *trivialization*. We live on several planes, but they intersect and intertwine. One can not and should not attempt an arbitrary division between the sacred and the secular. Christians accept Jesus Christ as the Lord of all life.

Yet, it is possible to put down, make light of, reduce to ridicule The Holy. Abraham Heschel, a great man of faith, spent his life attending awe as the ultimate emotion. Louis Cobb said, "The bump of reverence on the American head is a dent."

Great hunks of humanity in this country see nothing wrong with "using" prayer. If we who have given our lives to Him Who Was and Is and Ever Shall Be mean what we say and sing on Sunday, we will resist trivialization.

At seminary we had a yell for the intra-mural football team: "Yea black! yea gray! Seminary, Seminary! Let us pray!" Irreverent? Certainly!

However, it wasn't as dangerously irreverent and threatening to the spiritually sensitive as the move to allow government to get into religious observance. It seems that the religious right would like to name God the National Mascot. Trivialization!

Next, think about *reductionism*. For some, school prayer may not be tainted by this term. If, for you, prayer is nothing but ritual, mechanical observance, surface activity that has little if anything to do with heartfelt religion, it doesn't matter. If prayer is repeating rote phrases without engaging the mind, who cares what goes on in school.

If so-called school prayers are effective, compelling, and meaningful, then they constitute indoctrination, evangelization, and they have no part in the patterns of public school life.

On the other hand, if prayer is weak-kneed and wishy-washy, a poor imitation of the real thing, then it constitutes a threat to authentic religion, contradicting what is being taught at home and church or synagogue. School "praying" can work like a flu shot. An innoculation of diluted deism can make some children immune, or at least resistant, to real religion.

Mr. Justice Stevens was correct in calling school prayers "compelled ritual." That's reductionism.

Now look at *revisionism*. Rewriting history is a growth industry of the fundamentalists who have recently come alive to their civic duties. It takes the place of study and research. It portrays Colonial America as a Christian nation. In fact, less than 20% of those people had any church connection. It portrays the founding fathers as great men of the Faith. In fact, some were bounders, others, deists, all sons of the Enlightenment. It minimizes the dedication of the framers of the Constitution to Jefferson's "wall of separation" between church and state.

In evaluating recent history advocates of religious exercise in the public classroom moan that all our present ills stem from "putting God out of the schools" (as if the Heavenly One could be carted about). In fact, school prayers have been faithfully and widely practiced in other countries and they haven't brought idealistic Islam to Iran, churchgoing to England, religious toleration to Belgium, sexual morality to Sweden, freedom of thought to Spain, or peace to Northern Ireland. They pray in schools there.

Collectivization is another real danger in our world. We don't need homogenized culture and religion in this country any more than it is needed in communist lands. Part of our strength lies in our pluralism and diversity. If we had prayers in public settings, they could be Buddhist in Hawaii, Mormon in Utah, Baptist in Mississippi, Roman Catholic in New Mexico and Black Muslim in Harlem.

On the other hand, someone has suggested that public school prayer to be fair would have to be addressed "to whom it may concern."

Lowest-common-denominator religion is not worth much to anyone. Emil Brunner criticized collectivism saying that it makes up society "like briquets of so many pulverized individuals." Moves to approve school prayers are steps toward collectivization.

One more word: *authoritarianism*. The dictionary says it is "of, relating to, or favoring a principle of often blind submission to authority as opposed to individual freedom."

Most of the folks for "returning prayer to the schools" have never thought about how such a practice fosters authoritarianism. It does so even and especially with the dedicated and caring teachers of small children. Most often these teachers do not want that role. They'd reject it if they could. Many, if not most of them, understand that for prayer to be real it has to be free. They're not interested in "favoring a principle of blind submission" particularly when it comes to religion. Most Americans are not opposed to individual freedom. We hate authoritarianism.

Explain these words to your Congressman, will you? The Supreme Court was right to reject government meddling in religion and efforts to legalize school prayers.

Senator HATCH. Thank you, Mr. Dunn. We will go to you, Ms. Merel.

STATEMENT OF GAIL MEREL

Ms. MEREL. Thank you, Senator. It is a great honor for me to be here to testify on Senate Joint Resolution 73 and related amendments relating to public prayer. I am here, as you indicated, on behalf of the Association of the Bar of the City of New York, which is an association of over 13,000 lawyers.

I understand that the report which I have submitted will be introduced into the record, and I want to point out that it is a report issued by that association.

Senator HATCH. Without objection.

Ms. MEREL. The Bar Association strongly urges rejection of the amendment proposed in Senate Joint Resolution 73, as well as any other similar proposal endorsing public prayer.

Since we have already introduced the report into the record, I would just like to take a few minutes to address some of the practical difficulties created by this amendment. Its proponents argue that it serves merely to reaffirm the strong religious heritage of this country. The Association agrees that ours is a religious nation, but we are also mindful that ours is a nation of great religious diversity.

If, in fact, we all held the very same religious beliefs, a moment of prayer might be a good thing. But we do not all share the same religious views, and our religious diversity, as we all know, has been growing, not diminishing.

Because of this country's religious diversity, the Association believes that the proposed amendment will have at least two pernicious consequences. First, implementation will divide, not unite, political communities along religious lines. And second, it will require public officials to decide what is and what is not religion, an inquiry touching on the most personal of interests.

These consequences arise from the fact that when you decide to encourage religion, you have to decide what religion to encourage. The amendment would, for example, permit schools and other public institutions to select some sort of nondenominational prayer for public recitation. But how can public institutions compose such prayers without in the process dividing themselves along religious lines? It has been suggested here in earlier testimony that this could be easily accomplished by some sort of interfaith council. The problem is: who is to sit on such a council?

In addition to the many religions that have traditionally been represented in this country, there are an increasing number of new religious sects. There are also many highly religious individuals who belong to no organized religion. It has been suggested in earlier testimony that these decisions relating to public prayer may be easily left to local school boards. But who among us, even on a local level, should have the power or the right to decide, in the case of each public institution, which of these religious groups and individuals is entitled to participate in the composition of a nondenominational prayer?

The principal problem, of course, is that what is nondenominational to some may be religiously offensive to others. It is, in fact, difficult even to conceive of one prayer capable of satisfying the religious needs of all groups and individuals. Any such prayer would force adherents of many highly respected traditional or fundamentalist religions to absent themselves, because in their view such nondenominational prayers too greatly dilute the religious experience.

The alternatives to a nondenominational approach unfortunately present even greater difficulties. A public prayer chosen to reflect the views of a majority clearly excludes and must offend minority views. Moreover, the religious majority of any one public institution is not necessarily the religious majority of any other.

We can certainly expect, therefore, that adherents of every religion will want to absent themselves from the prayers selected by some, if not many, public institutions. We can also expect that the majorities in some public institutions may choose to endorse highly controversial forms of prayer. The Association is greatly concerned that, armed with this amendment, certain groups may try to use the public schools and other public institutions for the promulgation of views which are not truly religious, even in their own scheme of things.

The risk of unexpected results is well illustrated by a recent New Jersey case involving the right to teach Transcendental Meditation in the public schools. Although proponents of TM denied its religious character, the New Jersey courts decided over their objection that TM is a religion and cannot be taught in the schools with out violating the establishment clause.

Ironically, under Senate Resolution Resolution 73 or any similar prayer amendment, Transcendental Meditation, now removed from the public schools as a religion, could return as a constitutionally permitted form of prayer. Its adherents could certainly claim a right, at least in New Jersey, to participate in the composition of any public prayer.

Under any interpretation of Senate Joint Resolution 73, the proposal will involve the courts and other branches of government in determining what constitutes religious belief and prayer.

Even if, instead of a nondenominational or majoritarian approach, we were to permit some form of participation by many religious groups on some sort of voluntary or rotational basis, the definitional problem of whose claims should be treated as religious will necessarily remain.

Surely even those who disagree with many aspects of the Supreme Court's interpretation of the establishment clause must agree that we embark on an unwise course when we permit government, at whatever level, to act as the arbiter of what is orthodox or acceptable or even nondenominational in matters of religious conscience.

Amending the Constitution to permit simple public prayer may seem a small, politically appealing step. But it cannot be so in a pluralistic society such as ours. The Association of the Bar of the City of New York urges that this subcommittee decide to leave religious matters to the realm of individual conscience and reject adoption of the proposed amendment.

I would also like to add, in light of one of the earlier comments, that the association's report does not address certain court decisions in the text, because the report primarily addresses Senate Joint Resolution 73. We have, however, considered decisions such as the *Lubbock* and the *Brandon* in certain of the footnote materials, and I would be happy to discuss those cases here.

Senator HATCH. We will be happy to receive your information on that.

[The report of the association of the Bar of the city of New York follows:]

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The Prayer Amendment

By THE COMMITTEE ON FEDERAL LEGISLATION

On March 24, 1983, six senators introduced S.J. Res. 73,[1] which proposes to amend the Constitution to provide:

> Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer.

This resolution in the 98th Congress is identical to proposals which were introduced in the 97th Congress[2] and recommended for passage by President Reagan.[3] S.J. Res. 73 is but the most recent of a number of proposed constitutional amendments introduced over the past two decades and intended to reverse[4] the Supreme Court's landmark school prayer cases of 1962 and 1963, *Engel v. Vitale*[5] and *School District of Abington Township v. Schempp.*[6] In *Engel* and *Schempp*, the Court held that government sponsorship of prayer in public schools, even if nondenominational, violates the First Amendment prohibition that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Since 1963, every Congress has considered and rejected attempts, whether through legislation or constitutional amendment,[7] to reverse *Engel* and *Schempp*, although only two bills and one such amendment have ever been reported out of committee.[8]

In 1974, after a decade in which scores of resolutions propos-

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ing prayer amendments to the Constitution were introduced in Congress, this Committee issued a report[9] on two alternative proposals. One of these proposals would have established the right in schools and other public buildings to "participate voluntarily in nondenominational prayer or meditation." The other would have declared that nothing in the Constitution prohibits the states "from providing for voluntary prayer in the public schools" or abridges "the right of persons lawfully assembled in any public building to participate in voluntary prayer." In our 1974 Report, we concluded that these then current attempts to amend the Constitution were "ill-advised—at best likely to generate endless controversy and litigation, and at worst a breach of the traditional wall separating Church and State in this nation."[10]

The introduction of proposed constitutional amendments concerning school prayer continued without interruption in the second decade after *Engel* and *Schempp*. In the last Congress, ten such proposed constitutional amendments were introduced.[11] Additionally, in the 96th and 97th Congresses, bills were proposed that would have stripped the federal courts, including the Supreme Court, of jurisdiction over school prayer disputes, but these controversial jurisdiction-stripping bills—for reasons which did not reach the merits of permitting government sanctioned prayer in public schools—were never enacted.[12]

S.J. Res. 73 raises once again the question whether there can be governmental support of religion without giving rise to indoctrination, coercion, and serious discrimination against religious minorities. As noted in our 1974 Report, debate over the appropriate relationship between religion and government has a long history in this country.[13] Many of the earliest American colonists left Europe in order to avoid punishment for nonparticipation in established church services; and many settlers, once here, in turn fled from American settlements in order to be free to express their own religious beliefs.[14] Neither the adoption of the First Amendment religion clauses in the Bill of Rights nor more than a century of Supreme Court interpretation of those clauses has stemmed the controversy which continues to follow the subject of church-state relations in this country.

Yet, notwithstanding the continuing controversy, there already exists considerable latitude for the practice of religion and expression of religious beliefs and ideas in this country. Under current law, both majority and minority religious groups are generally free to practice their religions and to pray in nondisruptive ways without governmental interference. Those who do not wish to attend public school may satisfy public education requirements by attending parochial schools where prayer can be made an integral part of the program of education.[15] Children do not have to attend public schools on their religious holy days.[16] The Supreme Court has even interpreted the free exercise clause to exempt Amish children from attending any public school program after the eighth grade.[17]

The Court has also upheld released time programs that permit students to leave school during public school hours to attend churches of their choice for a period of instruction.[18] Financial aid to religious schools has repeatedly been upheld in cases where a *bona fide* secular purpose for such aid exists and there is no appearance of official sponsorship of religion.[19] Public schools are free to teach about the cultural, artistic, and historical aspects of religion.[20] Finally, nothing now prevents individual students from deciding, on their own, to pray silently or privately in study halls, during their lunch hours, and perhaps even at other times during the daily public school schedule.

We believe that the prayer amendment proposed in S.J. Res. 73 or any similar proposal endorsing prayer in public schools and other public institutions is unnecessary to enhance religious freedom, and we oppose it for that reason. But we oppose S.J. Res. 73 for another important reason as well. We believe that, in application, a constitutional amendment of this kind, intended to encourage not only "religion" in general but certain forms of religious expression, could actually undermine the religious freedom of millions of Americans, do a disservice to religion, and prove divisive to the body politic. These are precisely the effects that the principle of separation of church and state was designed to prevent. As we said in our 1974 Report about similar proposals, the prayer amendment proposed in S.J. Res. 73 is extremely ill advised.

In our view, by permitting the official sponsorship of prayer, S.J. Res. 73 would seriously endanger both the political process and religious liberty—without providing any corresponding benefit. In fact, a substantial number of organized religious groups and theologians have consistently opposed amendments such as that proposed in S.J. Res. 73 because they believe that official prayer demeans the function of prayer in religion and the religious belief embodied in prayer.[21] We believe that implementation of a prayer amendment would divide communities along religious lines on the issue of what prayer or prayers school children and others should be told or permitted to say. Given the number of religious sects in this country,[22] it is almost inconceivable that a community of any size would agree on the proper content of publicly sponsored prayer.

Under any of a number of possible interpretations of the language of the amendment proposed in S.J. Res. 73, implementation is likely to entail excessive entanglement of government and religion, to prove coercive to religious believers and non-believers alike, and to vary widely in result from state to state and community to community. In our judgment, adoption of the proposed amendment is also unnecessary because, as we noted in our 1974 Report and above, existing law already provides extensive opportunity for students and others to engage in religious expression.

Accordingly, we strongly believe that S.J. Res. 73 and all similar proposals designd to encourage prayer in public institutions should be rejected. Set forth below is our detailed analysis of the applicable legal principles and the undesirable consequences that would flow from the adoption of the prayer amendment.

I. *The Prayer Amendment Conflicts with Basic Political Principles of This Country and Will Engender Political Divisiveness Along Religious Lines*

Proponents of S.J. Res. 73 argue that adoption of the amendment it proposes would merely restore to public life the expression of religious belief which has formed an important part of the American tradition.[23] They point to the acknowledgment of a Supreme Being in our national anthem and Pledge of Allegiance, and to the use, since 1865, of the words "In God We Trust" on our coinage as examples of our strong religious heritage.[24] However, though these acknowledgments exist, and though our nation clearly has a strong religious heritage, it is equally clear that attempts to institute programs of public prayer have frequently led to political dissension and discord[25] and that the ever-increasing diversity in our religious heritage[26] is totally at odds with the idea of government sponsorship of prayer. In this respect, the amendment to the Constitution proposed in S.J. Res. 73 would reverse not only the *Engel* and *Schempp* school prayer decisions, but also a long and consistent development of Supreme Court doctrine[27] under which the establishment clause has stood, in part as a response to our religious diversity, as a bulwark against the use of governmental power or prestige to encourage any one set of ideas over another in matters of religious belief.

As already noted, the impetus for a prayer amendment was *Engel v. Vitale*.[28] There, the Supreme Court held unconstitutional the recitation of the following "nondenominational" prayer[29] as part of the daily program of New York public schools, even though participation in such prayer was ostensibly voluntary:[30] "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country." The New York State Board of Regents had recommended the prayer to all local school boards in 1951, and in 1958 the New Hyde Park Board of Education instructed all teachers that the prayer was to be recited aloud by each class at the beginning of every school day. In invalidating the regulation, the Supreme Court stated:

> [T]he constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.[31]

Noting the early recognition by the Colonies of the extent to which political strife and personal hardship arise from governmental approval of particular forms of worship, the Court concluded that the framers intended the First Amendment "to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say."[32]

One year later, in *School District of Abington Township v. Schempp*,[33] the Supreme Court again considered and invalidated the selection by government of public forms of religious expression. At issue in *Schempp* was the constitutionality of a Baltimore school board rule that required "reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer"[34] and a Pennsylvania statute that prescribed: "At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day."[35] The Pennsylvania Bible reading was either conducted by the homeroom teacher or broadcast by students under teacher supervision to each classroom over the loudspeaker system and was followed by a standing recitation of the Lord's Prayer and the Pledge of Allegiance.[36] Supporters of these school exercises argued that they aided the legitimate, secular purpose of "the promotion of moral values, the contradiction to [sic] the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature."[37]

The Court ruled that the regulations requiring these practices violated the First Amendment even though students could be excused from participating on written request of a parent or guardian,[38] because of the undeniably religious character of the activity.[39] According to the Court, both the free exercise and establishment clauses of the First Amendment embody a principle of "wholesome" neutrality between church and state: The establishment clause prohibits government from placing "official support . . . behind the tenets of one or all orthodoxies."[40] The free exercise clause guarantees "the right of every person to freely choose his own course . . . free of any compulsion from the state."[41]

Writing for the majority in *Schempp*, Justice Clark rejected the argument that "unless these religious exercises are permitted a 'religion of secularism' is established in the schools,"[42] or that the Court's decision would interfere with the majority's right to religious free exercise.[43] Justice Clark noted that the decision did not, for example, bar the "study of the Bible or of religion, when presented objectively as part of a secular program of education."[44] All that was prohibited were "religious exercises, required by the States,"[45] because such exercises violate the command of the First Amendment that government maintain strict neutrality in matters of religious worship or non-worship. According to the Court, the establishment clause

> withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[46]

In two recent cases involving the constitutionality of conducting religious exercises in public schools, the Court has reaffirmed this understanding that the establishment clause withdrew from the government the power to act with a religious, as distinguished from a secular, purpose. In *Stone v. Graham,*[47] a majority of the Court invalidated a Kentucky statute requiring the posting of a copy of the Ten Commandments in each public classroom in that state, because the "pre-eminent purpose" of the practice was "plainly religious in nature"[48] and its effect one of inducing "schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments."[49] The Court noted: "However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause."[50]

Most recently, in *Treen v. Karen B.*,[51] the Court affirmed without opinion a decision of the United States Court of Appeals for the Fifth Circuit invalidating a regulation providing for an optional minute of prayer in public school classrooms. The prayer at issue in *Treen* was to be offered by a student volunteer or, if no one volunteered, by the teacher, if he or she chose to do so. The lower courts had found that the purpose and primary effect of the regulation were impermissibly religious in character.[52]

The principles embodied in the school prayer decisions in *Engel, Schempp, Stone,* and *Treen*—neutrality between religion and government and the impermissibility of governmental regulation absent both a secular purpose and a secular primary effect—are consistent with Supreme Court interpretations in other establishment clause cases not involving prayer. Indeed, the neutrality principle was articulated by the Court in its first consideration of the meaning of the establishment clause in *Everson v. Board of Education.*[53] *Everson* involved a challenge to a school board resolution that authorized the reimbursement of parents' costs for transporting their children to private and parochial as well as public schools. The Court in *Everson* enunciated a doctrine of neutrality between church and state that has been adhered to[54] ever since:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal

> Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."[55]

Since *Everson*, the Court has developed and applied[56] the following three-part test for determining whether the requisite neutrality between religion and government has been maintained: A governmental regulation must (a) be adopted for a valid secular purpose, (b) have a primary effect that neither enhances nor inhibits religion,[57] and (c) not contain the potential for excessive entanglement, in the sense of sustained supervision and surveillance, of government with religion.\The Court has applied one or more parts of this test in establishment clause cases involving diverse issues, including public aid to parochial schools,[58] Sunday closing laws,[59] the tax exemption accorded property used for religious purposes,[60] and disputes within church hierarchies.[61]

It is, of course, open to those who so choose to try to amend the Constitution in order to remove public prayer from the operation of the neutrality principle. However, we believe that to do so would unwisely depart from Supreme Court doctrine that, for the past 35 years, has afforded a principled accommodation of widely divergent religious views. The Court's adoption of the neutrality principle is in no sense equivalent to a "constitutional requirement which makes it necessary for government to be hostile to religion."[62] Rather, existing law simply requires government to remain as neutral as possible, leaving every citizen free to choose and to practice his or her own devotions.[63] Indeed, in the past 35 years, programs of public aid to private (including parochial) schools have frequently been upheld[64] so long as the supported activities of those schools have involved "secular, neutral, or nonideological services, facilities, or materials."[65] As the Court has stated: "Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause."[66] In the context of universities and public property other than public schools, the Court also has held that once public facilities are made freely available as a public forum for the activities of a wide variety of nonreligious groups, they must also be made available for voluntary activities of religious groups, subject only to reasonable restrictions as to time, place, and manner of expression (unrelated to the content of expression).[67]

The principle of government neutrality in matters of religion, including the doctrine of excessive entanglement,[68] which underlies the school prayer and other establishment clause cases is firmly rooted in practical and historical considerations. By bringing prayer into public institutions, the amendment proposed in S.J. Res. 73 threatens to resurrect a bitter legacy of political division along religious lines. Though supporters of S.J. Res. 73 and similar legislation frequently have claimed to be returning to the principles of our founding fathers,[69] the proposed amendment in fact runs counter to the views of many of the framers on church-state relations.[70] James Madison, for example, opposed every form and degree of official relation between religion and civil authority.[71] In his view, conflicts among religious groups "tend to enervate the laws in general and to slacken the bands of Society."[72]

Long before the Court's invalidation of government sponsored school prayer in *Engel* and *Schempp*, the discord which attended attempts to impose public school prayer at the state and local level showed the wisdom of Madison's perception that religious issues can seriously divide the political community. Even prior to *Engel*, state courts and administrators had often observed that such programs tend to impose religious views on unwilling minorities and to foster divisiveness as well as discrimination against nonbelievers or minority sects.[73] The Supreme Court, too, has noted the danger that division of communities along religious lines tends to obscure other "issues of great urgency":

> Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.
>
> Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.[74]

Such fears are more than justified by this country's actual experience with school prayers, bible readings, and religious celebrations in public schools.[75] In 1854, for example, when a Jesuit priest in Maine advised his parishioners to defy a school committee regulation requiring all children to read the King James Bible, "a mob broke into his house, dragged him out, tore off his clothing, tarred and feathered him, and after two hours of cruel treatment, finally released him."[76] The history of the simple nondenominational prayer struck down in *Engel* is similarly instructive. The *Engel* decision ended years of controversy that had begun as soon as the New York Board of Regents announced the wording of the suggested prayer:

> The announcement aroused a storm of controversy. The proposal was opposed by the leading Protestant weekly, *The*

> *Christian Century*, which deemed the practice ineffectual, and the prayer "likely to deteriorate quickly into an empty for~~mality with~~ little, if any, spiritual significance." The leaders of the Lutheran Church of Our Redeemer in Peekskill, New York, charged that Christ's name had "deliberately been omitted to mollify non-Christian elements," and that the prayer "therefore is a denial of Christ and His prescription for a proper prayer. As such it is not a prayer but an abomination and a blasphemy."
>
> Opposition, but for different reasons, was also voiced by all the major Jewish organizations, . . . as well as such non-sectarian organizations as the American Civil Liberties Union, the New York Teachers Guild, the United Parents Association, and the Citizens Union.[77]

Recent experiences confirm that passage of the amendment proposed in S.J. Res. 73 would increase rather than end religious controversy. An Oklahoma resident and member of the Church of the Nazarene, who asked the Civil Liberties Union to file suit to stop religious activities begun in February 1981 in her child's school, was assaulted on the school grounds and has since moved to another school district to avoid harassment and threats.[78] In New Jersey, a school board member said, "Neighbors are fighting neighbors"[79] as a result of a proposed requirement to observe a "moment of reverent silence" (later changed to a "moment of silent meditation" and then simply to a "moment of silence"). An Alabama agnostic was reportedly threatened with death after challenging in court a law of that state requiring recital of a prayer written by the governor's son before meals in the public schools.[80]

The constitutional amendment proposed in S.J. Res. 73 does not purport to state what prayers or prayer programs should be instituted. These decisions are left to the members of each "public institution."[81] The proposed amendment guarantees, therefore, that the social and political problems inherent in selecting religious exercises for public expression will be resolved in many different and unexpected ways across the country.[82] In our view, controversy and confusion of the most bitter and personal sort, and of a nature least amenable to mediation through the political process, would proliferate throughout the country if any amendment allowing officially sanctioned public prayer were to become law.

II. *The Undesirability of Any of the Possible Interpretations of S.J. Res. 73*

S.J. Res. 73 does not require public prayer. It simply states that nothing in the Constitution shall prohibit individual or group prayer in public institutions. The decision to conduct prayer and selection of the content of permissible prayer are left to each public institution to determine as best it may.[83] Undoubtedly it is this absence of religious content that accounts for some of the appeal of S.J. Res. 73, since the amendment it proposes nowhere designates any particular form of prayer for public recitation.

Though simple on its face, the amendment invites a number of interpretations, each of which raises serious practical as well as constitutional problems. One could, for example, interpret the amendment proposed in S.J. Res. 73 to mean that, in any public institution, a single official prayer (presumably either a sectarian prayer selected by a majority or one intended to be "nondenominational") constitutionally may be selected for recitation or observance by an entire group. This understanding seems to be shared by many supporters of the amendment.[84] The language of S.J. Res. 73 may also, however, sanction the right of any individual to have his or her personal choice of prayer recited aloud. Or, because the latter approach could result in hours of daily public prayer, S.J. Res. 73 might be interpreted to require or permit some system of simultaneous or rotational prayer or "equal time" for the use or alternating use of any religious prayer sincerely suggested by any individual desiring to have his or her choice of prayer recited aloud.[85]

It is the stated premise of many who support this amendment[86] that religion and religious prayer are forces for moral good and therefore to be encouraged by the body politic. However, implicit in such views are preferences for specific religions as sources for the moral good to be encouraged.[87] This illustrates part of the problem with the proposed amendment. In our pluralistic society, opening schools and other public institutions to religious observances will authorize far more than the simple homilies, nondenominational prayers, or moments of silence apparently anticipated by the amendment's sponsors.[88] However the amendment proposed in S.J. Res. 73 may be interpreted, its moral effect is neither clearly predictable nor desirable.

A. *The Undesirability of an Interpretation Which Sanctions the Recitation of a Single Nondenominational or Majority-Composed Prayer*

It is likely that many of those who favor adoption of the amendment proposed in S.J. Res. 73 expect that its result will be the composition by public groups of non-denominational prayers that will then be recited in public institutions or at public events.[89] As a practical matter, it is difficult to imagine any prayer or series of prayers recited in a second-grade class, for example, that would not be some sort of officially composed prayer. Such a prayer was precisely what the New York Board of Regents attempted to compose amid much controversy and what the Supreme Court invalidated in *Engel v. Vitale*.[90]

In fact, however, it is far from clear that the words "individual or group prayer" which appear in the amendment proposed in S.J. Res. 73 are entirely consistent with the imposition of any single "official" prayer, particularly given the continued presence in the Constitution of the establishment clause. Further, it is difficult to imagine the contents of any one such prayer which could take into account the religious dogma not only of the hundreds of sects, factions, and cults in this country, but also of each of the less formalized belief systems that may be religiously held by isolated groups and individuals. In this country, "In 1960 there existed 'more than 400 more or less definitely organized bodies . . .

[not including] the multitude of store-front churches, local sects, cults, and unclassifiable quasi-religious associations.' "[91] One commentator has said that "the 'spiritual explosion' of the 1960's and 1970's has generated untold additional diversification."[99]

Further, even if some form of nondenominational prayer could be successfully devised, the amendment clearly would remain unacceptable to a number of recognized and orthodox religious groups.[93] Even a prayer as succinct as the one at issue in *Engel* offended many established religions.[94] Public use of such a prayer would necessarily offend those religious sects who believe in no divinity,[95] as well as many others for whom that prayer's omission of particular sacred words may be highly objectionable, if not sacreligious.[96]

Requiring the public recitation of a non-denominational prayer reflects a preference for a more latitudinarian over a more fundamentalist approach to religion. There are many who believe that any attempt to make prayer "acceptable" to as many religious groups as possible simply weakens prayer, reducing prayer to the lowest common denominator of religious expression.[97] In fact, James Madison's opposition to any official relationship between religious and civil authority stemmed as much from the threat that governmental support would degrade and dilute the religion of a majority as it did from his fears of any threat to religious minorities. Madison observed that "experience witnesseth that ecclesiastical establishments, instead of maintaining purity and efficacy of Religion, have had a contrary operation."[98] The results of such establishments have been "pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution."[99] The relationship between political support and political trivialization of religion has not gone unnoticed by the Supreme Court; the decision to strike down the "nondenominational" prayer in *Engel* rested, in part, on that view.[100]

The language of S.J. Res. 73 also might permit the public recitation of a group prayer composed by a simple majority of that group.[101] Clearly, implementation of such an interpretation would cause the kind of divisiveness and strife historically experienced by communities that have attempted to adopt forms of public prayer.[102] Such an interpretation would also prove even more antithetical to existing establishment clause doctrine than any nondenominational requirement, since it would permit a majority to "establish" its particular religious views for an entire community.

Because a "public institution" may well embrace a relatively small group of people, it is also impossible to predict the types of prayers or prayer programs that could be publicly sponsored under this amendment. The amendment proposed in S.J. Res. 73 could have the effect of sponsoring as many varied minority views as there are "public institutions."[103]

B. *The Undesirability of an Interpretation Which Sanctions a Rotational or an "Equal Time" Approach to Public Prayer and the Problem of Defining Religion*

The reading of the amendment proposed in S.J. Res. 73 that is perhaps most consistent with the history of this country and with Supreme Court doctrine in both establishment and free exercise cases would grant anyone the opportunity to have his or her prayer included among a public institution's prayers—perhaps on some kind of alternating or rotational basis, or by granting individuals an opportunity to pray either separately or simultaneously at a common period set aside for prayer.[104] As with any other interpretation of the amendment proposed in S.J. Res. 73, however, this approach raises serious difficulties: Most troublesome is the problem of how to define "religious" beliefs and "prayer."[105]

This definitional problem is not new and has been analyzed by the Court, most notably in the conscientious objector cases. Under the Selective Service Act, conscientious objectors are exempt from combatant training if they oppose participation in war "by reason of their religious training and belief"—defined by statute as an individual's belief in relation to a Supreme Being, rather than "essentially political, sociological, or philosophical views or a merely personal moral code."[106] This statutory distinction between religious and essentially philosophical views has not in practice been an easy one to draw. As the Court said in *United States v. Seeger*:

> [T]he task of discerning the intent of Congress in using the phrase "Supreme Being" [is] a complex one. Nor is it made the easier by the richness and variety of spiritual life in our country. Over 250 sects inhabit our land. Some believe in a purely personal God, some in a supernatural deity; others think of religion as a way of life envisioning as its ultimate goal the day when all men can live together in perfect understanding and peace. There are those who think of God as the depth of our being; others, such as the Buddhists, strive for a state of lasting rest through self-denial and inner purification; in Hindu philosophy, the Supreme Being is the transcendental reality which is truth, knowledge and bliss.
>
> . . . .
>
> Moreover, it must be remembered that in resolving these . . . problems one deals with the beliefs of different individuals who will articulate them in a multitude of ways. . . . The validity of what [registrant] believes cannot be questioned. Some theologians, and indeed some examiners, might be tempted to question the existence of the registrant's "Supreme Being" or the truth of his concepts. But these are inquiries foreclosed to Government.[107]

Similarly, in cases brought under the free exercise clause, where members of religious groups have sought to be exempted from the operation of general regulations on the basis of unusual religious principles or practices, the Court has found it difficult not to defer to an individual's or group's own sincere characterization of its belief system as "religious."[108] In *Thomas v. Review*

Board of the Indiana Employment Security Division,[109] for example, the Court recently required the extension of unemployment benefits to a Jehovah's Witness whose religious scruples against warfare prevented him from assembling tank turrets for an employer who could not provide alternate employment. The Court held in *Thomas* that state courts and administrative officials had erred in refusing to accept Thomas' beliefs as religious: the illogic or incomprehensibility of his beliefs, or even their inconsistency with those of other Jehovah's Witnesses, were held to be irrelevant to proper governmental regulation. According to the Court:

> Courts should not undertake to dissect religious beliefs because the believer admits that he is "struggling" with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ. . . . Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.[110]

The problem of defining "religious" belief cannot be avoided even under a majoritarian or nondenominational interpretation of S.J. Res. 73, although the difficulties will be most pronounced where multiple prayers are to be recited. Once orthodox prayer is permitted in the public schools, those of less orthodox or even highly idiosyncratic or personal religious faiths will surely seek to accommodate the official prayer to their own forms of belief. As stated recently by one federal court:

> The dividing line between what is, and what is not, a religion is difficult to draw. . . . [C]ourts must ever be careful not to permit their own moral and ethical standards to determine the religious implications of beliefs and practices of others. Religions now accepted were persecuted, unpopular and condemned at their inception.[111]

In fact, because it is so difficult to distinguish between religious belief and strongly held moral belief, the proposed amendment can be expected to invite the use of schools and other public institutions as a forum for proselytizing by diverse religious groups, and by many whose views, however principled, may not—even in their own scheme of things—be truly religious. Unusual or even sham religious groups may also seek to use the public schools as a vehicle for the dissemination of their views.[112] By constitutionally permitting group prayer in settings where it is not now permitted, the school prayer amendment will almost certainly provide a public relations platform for many groups whose beliefs and practices are probably not even perceived to be religious, much less moral, by the supporters of S.J. Res. 73.

Malnak v. Yogi,[113] involving the teaching of transcendental meditation in New Jersey public schools, is instructive in this regard. In *Malnak*, plaintiffs challenged the teaching of TM in the public schools as an establishment of religion, and defendant organizations attempted to show that TM is not a religion and could, therefore, be freely taught. Their defense failed because the ceremony at which each student was given his or her mantra (that is, the word or phrase recited while practicing TM), although conducted on Sundays and not on school premises, involved the invocation in Sanskrit, accompanied by many accoutrements of religion, of a divine being.[114] Under a public prayer amendment, many of the TM practices removed from the New Jersey schools as expressions of religion could return as constitutionally permitted, perhaps even mandated, prayers, to be given "equal time" alongside more traditional religious faiths.

Linked to the problem of defining religion is the problem of determining what constitutes "prayer." Not all religious groups pray silently or individually. Some pray collectively; some pray aloud; others chant; still others engage in public testimony. Some practice nonverbal rituals, including candlelighting, incense burning, the playing of musical instruments, or the public solicitation of funds. In every instance of public prayer, someone will have to determine whether such verbal and nonverbal forms of religious exercise are to be permitted as part of that form of "prayer" sanctioned by the proposed amendment. Given our very broad understanding of free speech within the meaning of the First Amendment, resolution of this issue is not necessarily simplified by interpreting the amendment proposed in S.J. Res. 73 to permit only spoken forms of prayer. Yet the determination of what constitutes "prayer" will force public administrators and ultimately the courts to decide questions of religious doctrine and church practice—issues which courts, in keeping with the neutrality principle, have heretofore tried to avoid.[115]

We do not suggest that any one religious group or any one form of sincere prayer is more worthy than any other of public recognition. We merely suggest that once public institutions, including schools, are made available for the publication of prayers acceptable to some religious groups, they may have to be made available in some fashion for the prayers of all religious claimants. As the Supreme Court explained nearly forty years ago, government cannot lightly decide that some sincerely held beliefs are religious while others are not:

> Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. . . . It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. . . . The religious views espoused by [some] might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any

sect. When the triers of fact undertake that task, they enter a forbidden domain.[116]

Even if S.J. Res. 73 were revised to protect only silent forms of prayer and meditation,[117] these difficulties would not be removed. Government still would be engaging in religious as distinguished from secular activity, and it would still be elevating certain beliefs about religious things over others: Religious beliefs favoring public and silent prayer would be elevated over those advocating other forms of religious expression, just as religious belief would be elevated over atheism, agnosticism, or other forms of skepticism. In addition, fundamentalists and others still could legitimately complain that such restrained expression demeans the true religious experience.

Under any interpretation of S.J. Res. 73, the amendment will involve the courts and other branches of government in determining what constitutes religious belief and prayer—questions touching upon the most personal and fundamental interests. Surely, even those who disagree with many particulars of the Court's analysis of the establishment clause agree that government embarks on an unwise course when it undertakes to act as arbiter of what is orthodox in matters of religious belief or endeavors to judge the religious character of asserted liturgical practices. Amending the Constitution to permit simple prayers in public institutions, including schools, may seem a small, politically appealing step. But it is not. Not everyone in the United States believes in the same simple things. Our country was built on the principle that people may believe what they wish by right, not sufferance, and are not to be encouraged by government to pay lip service to religious beliefs which they do not share.[118]

C. *Prayer Permissible Under the Proposed Amendment Would Be Impermissible in Some States*

The amendment to the Constitution proposed by S.J. Res. 73 does not purport to supercede state law. Many states have and may continue to have constitutional provisions similar to the First Amendment or which provide in even stricter and more extensive terms for the separation of church and state.[119] Long before the Supreme Court's invalidation of government sponsored school prayer in *Engel* and *Schempp*, state courts ruled on controversies about school prayer or religious instruction, and in several states[120] such programs were invalidated under state law. These state courts perceived the same problems with regard to school prayer under state constitutional or statutory law as the Supreme Court found under the establishment clause: the appearance of state support for one religious view over another,[121] the inherently and ineradicably coercive effect on minorities,[122] the tremendous potential for political divisiveness,[123] and the difficulty in defining permitted prayer.

These state determinations would appear to be unaffected by an amendment to the Federal Consitution such as that proposed in S.J. Res. 73. Even if the proposed amendment were adopted, therefore, government sponsored prayer might still be held impermissible in some jurisdictions. Indeed, the fact that the same prayer program might well be treated differently by courts in different jurisdictions is itself an extremely undesirable feature of S.J. Res. 73. Religious questions would remain politicized at all levels of government for years to come, and confusion, uncertainty, and resentment about the place of religion in the public schools would abound.

III. *Interference with Religious Freedom*

The First Amendment religion clauses afford a two-pronged approach to protecting religious liberty. The establishment clause protects individual choice from the pressures of an official viewpoint. The free exercise clause proscribes more direct interference with a particular belief. In combination, the two clauses free the individual from the weight of government opinion and from oppressive governmental regulation.[125] The amendment proposed in S.J. Res. 73 contravenes the principle of individual religious freedom embodied in both the establishment and free exercise clauses.[126]

Any program of public prayer necessarily raises difficult issues relating to the protection of nonparticipants. S.J. Res. 73 purports to deal with the problem of coercion by stating that "no person shall be required by the United States or by any State to participate in prayer." No matter how the amendment is implemented, however, nonparticipation could force individuals to reveal their beliefs about religion. For example, refusal to participate in a nondenominational, *Engel*-type prayer—or even in a brief period of silent prayer—might tend to isolate and perhaps to stigmatize those who do not believe in religion, those whose religious beliefs may not be reflected in the selected form of prayer, those who do not believe in public expressions of religion, or those who do not believe in nondenominational or diluted forms of prayer.[127] If a simple majority is permitted to choose the form of public prayer, the amendment would operate to isolate those individuals, potentially a small and perhaps already unpopular minority, who do not agree with the majority's religious views. This isolation is particularly troublesome with respect to prayer in the schools.

> [T]he majority of cases which have considered this problem have said that no real choice is offered in the case of young children who have not reached the maturity to practice nonconformity. The onus attached to leaving the room during an exercise which the rest of the class believes is part of a good upbringing, it is argued, is too great for the average child. The choice of risking the censure of classmates by adhering to one's religious beliefs or of compromising by conforming to the practice of the group has been held to be no choice at all.[128]

Certainly any implementation of the amendment involving the prayers of many interested groups would have the effect of publicly identifying adherents to various minority as well as majority religious views.

The Supreme Court alluded to these problems in 1948 in deciding to invalidate a released time program conducted within the public schools.[129] As Justice Frankfurter then noted, merely to provide for non-participation in such programs would not dissipate the coercion inherent in bringing particular forms of religious activity into the schools: "The children belonging to these non-participating sects will thus have inculcated in them a feeling of separatism when the school should be the training ground for habits of community, or they will have religious instruction in a faith which is not that of their parents."[130] Proponents of S.J. Res. 73 reject such a theory of "implied coercion."[131] However, as the Supreme Court of Nebraska has stated with respect to a teacher's role in leading "voluntary" devotional exercises, "A request from one in authority is understood to be a mere euphemism. It is in fact a command in an inoffensive form."[132] A similar effect was alleged by the plaintiffs in *Schempp*[133] and has been found to exist by state and lower federal courts in cases involving "voluntary prayer" programs.[134]

We do not believe that our governments should require any individuals, let alone young children, publicly to reveal their religious beliefs, any more than our governments should require adult voters to disclose the manner in which they vote or their other affiliations.[135] The fact that children are so impressionable and also so reluctant to be seen as nonconformists renders any school supported program of public school prayer—whether recitational or silent—inherently coercive. In our judgment, "voluntarism" or "voluntary nonparticipation" in no way mitigates the pressures to conform. Even devoutly religious students may be unwilling to absent themselves from a program of prayer which their parents find objectionable because of a fear that fellow students might regard them as atheists or just different. To allow such a result would be inconsistent with more than half a century of constitutional interpretation protecting parents' First

Amendment right to form the religious views of their children without state interference.[136] Even "voluntary" prayer meetings conducted during non-school hours in public elementary or high school facilities may be impermissible if their effect is to give the appearance of school support for particular religious activity.[137]

Coupled with such inherent coercion is the real possibility of overtly coercive practices. Though the proposed amendment states that no person shall be required to participate in prayer, the implementation of a truly noncoercive program surely is problematic, especially in the public school classrooms of young children. How a student is excused from prayer, what is said, where the student is required to go, and the treatment generally accorded those who choose not to participate in prayer are all factors which can be expected to vary tremendously not only from jurisdiction to jurisdiction, but from classroom to classroom within the same school. Without doubt, government and the courts will be involved in monitoring these activities on a local level.

In a political context, the Supreme Court has warned against the dangers of a "pall of orthodoxy over the classroom."[139] Those dangers would seem nowhere more acute than in the area of religious belief. Yet, at a stage in life when one is most susceptible to pressure to conform, the proposed amendment would permit state sanctioned pressure to conform to alien modes of religious worship and ultimately perhaps to alien religious thoughts.[140] If government may pressure skeptics or dissenters to conform at such an early age to majority views in this most personal area of life, it may be in a position to pressure them to conform in other fundamental respects as well.[141]

Conclusion

The divisiveness and strife which this country has heretofore experienced in connection with public prayer, coupled with the difficulty of dealing with issues of religious definition in a pluralistic society such as our own, strongly militate against any unnecessary and uncertain constitutional change in matters of religious conscience—especially where, as here, implementation of the proposed amendment is fraught with serious practical problems. We urge rejection of S.J. Res. 73 or any similar proposal endorsing prayer in public schools and other public institutions.

May 12, 1983

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FOOTNOTES

[1] 129 Cong. Rec. S3973 (daily ed. March 24, 1983). At least ten other resolutions or bills have been introduced in Congress during the present session seeking to permit and even to recommend the use in the public schools of some form of public prayer or religious activity, including silent prayer, the reading of Scriptures, and the recitation of prayer aloud. *See, e.g.*, H. Con. Res. 53, 98th Cong., 1st Sess. (1983); H. Con. Res. 38, 98th Cong., 1st Sess. (1983); H. Con. Res. 14, 98th Cong., 1st Sess. (1983); H. Con. Res. 13, 98th Cong., 1st Sess. (1983); H. Con. Res. 5, 98th Cong., 1st Sess (1983); H.J. Res. 133, 98th Cong., 1st Sess. (1983); H.J. Res. 104, 98th Cong., 1st Sess. (1983); H.J. Res. 100, 98th Cong., 1st Sess. (1983); H.J. Res. 81, 98th Cong., 1st Sess. (1983); S. 88, 98th Cong., 1st Sess. (1983).

[2] 128 Cong. Rec. S5428 (daily ed. May 18, 1982) (introducing S.J. Res. 199); 128 Cong. Rec. H2852 (daily ed. May 25, 1982) (introducing H.J. Res. 493). Neither resolution was reported out of Committee during the last session of Congress.

[3] *See* President's Message to Congress Transmitting Proposed Constitutional Amendment—Prayer in Public Schools, 1982 U.S. Code Cong. & Ad. News D45 (May 17, 1982) (hereinafter cited as "President's Message").

[4] *Id.* at D46; *Proposed Constitutional Amendment to Permit Voluntary Prayer: Hearings on S.J. Res. 199 before the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 253 (1982)

(hereinafter cited as "Hearings") (statement of E. C. Schmults, Deputy Attorney General, U.S. Department of Justice).

[5] 370 U.S. 421 (1962).

[6] 374 U.S. 203 (1963).

[7] *See* Ackerman, *Legal Analysis of President Reagan's Proposed Constitutional Amendment on School Prayer*, Library of Congress Congressional Research Service Report CRS-22 (June 2, 1982) (hereinafter cited as "Ackerman").

[8] A bill sponsored by Senator Dirksen failed to receive a two-thirds majority in the Senate in 1966, and, in 1971, a House bill failed to receive a two-thirds majority in the House. The only other proposed school prayer amendment to be considered on the floor of either house was one added as a rider to the equal rights amendment in 1970 and widely perceived as an effort to kill the ERA. *See id.* at CRS-22-25.

[9] Committee on Federal Legislation, *The Prayer Amendment*, 29 Rec. A.B. City N.Y. 87 (1974) (hereinafter cited as "1974 Report").

[10] *Id.* at 88.

[11] Ackerman, *supra* note 7, at CRS-22 n.45.

[12] H.R. Res. 20, 97th Cong., 1st Sess. (1981); H.R. 4756, 97th Cong., 1st Sess. (1981); H.R. 1335, 97th Cong., 1st Sess. (1981); H.R. 989, 97th Cong., 1st Sess. (1981); H.R. 865, 97th Cong., 1st Sess. (1981); H.R. 408, 97th Cong., 1st Sess. (1981); H.R. 326, 97th Cong., 1st Sess. (1981); H.R. 72, 97th Cong., 1st Sess. (1981); H.R. 354, 96th Cong., 1st Sess. (1979); H.R. 1082, 96th Cong., 1st Sess. (1979); S. 438, 96th Cong., 1st Sess., 125 Cong. Rec. 2268 (1979); *see* Committee on Federal Legislation, *Jurisdiction-Stripping Proposals in Congress: The Threat to Judicial Constitutional Review*, 36 Rec. A.B. City N.Y. 557 (1981).

[13] 1974 Report, *supra* note 9, at 92.

[14] *See* Everson v. Board of Educ., 330 U.S. 1, 8-14 (1947), and authorities cited at notes 70-72 *infra*.

[15] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[16] *See* Zorach v. Clauson, 343 U.S. 306, 313 (1952).

[17] Wisconsin v. Yoder, 406 U.S. 205 (1972).

[18] Zorach v. Clauson, 343 U.S. 306 (1952).

[19] *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980) (testing and reporting services); Wolman v. Walter, 433 U.S. 229 (1977) (textbooks; testing, diagnostic and therapeutic services); Meek v. Pittenger, 421 U.S. 349 (1975) (textbook loans); Hunt v. McNair, 413 U.S. 734 (1973) (revenue bond financing of colleges); Tilton v. Richardson, 403 U.S. 672 (1971) (grants for construction of college facilities); Board of Educ. v. Allen, 392 U.S. 236 (1968) (textbooks); Everson v. Board of Educ., 330 U.S. 1 (1947) (bus transportation).

[20] *See* School Dist. v. Schempp, 374 U.S. 203, 225 (1963) (dictum). *See also* Florey v. Sioux Falls School Dist., 619 F.2d 1311 (8th Cir.), *cert. denied*, 449 U.S. 987 (1980) (secular purpose found in school board policy permitting reference to social or cultural aspects of religion and "observance" of religious ceremonies such as the singing of Christmas carols). There is even some authority that a moment of silence for purposes of meditation (including prayer) might be instituted in public institutions, including schools, without violation of the establishment clause, provided a showing can be made that it has been instituted for a *bona fide* secular purpose. *See* Gaines v. Anderson, 421 F. Supp. 337 (D. Mass. 1976). In *Gaines*, a three judge court sustained the constitutionality of a Massachusetts statute which required a "period of silence not to exceed one minute" for "meditation or prayer." *Id.* at 339. The decision was based on findings that the statute had a legitimate secular end and did not impermissibly advance religion. Approximately twenty states have passed some form of "moment of silence" legislation in the wake of the *Gaines* decision although it is not clear how often such legislation is observed. Ackerman, *supra* note 7, at CRS-9 n.24; Note, *Daily Mo-*

ments of Silence in Public Schools: A Constitutional Analysis, 58 N.Y.U.L. Rev. 364 (1983). The New York Times reported that a Connecticut silent-meditation law "is believed by state education officials to be observed only casually, if at all." N.Y. Times, Oct. 19, 1982, at A1, col. 4. The Massachusetts statute was amended in 1979 to replace the "moment of silence" with a period for prayer exercises led by student volunteers. This statute was struck down as violative of the establishment clause by unanimous vote of the Supreme Court of Massachusetts. Kent v. Commissioner of Educ., 380 Mass. 235, 402 N.E. 2d 1340 (1980). That court subsequently advised the Massachusetts legislature that a proposed statute providing for a minute of prayer or meditation "offered by a student volunteer" would also violate the establishment clause. Opinions of the Justices to the House of Representatives, 387 Mass. 1201, 440 N.E.2d 1159 (1982). As noted *infra* text accompanying notes 51-52, the Fifth Circuit struck down a similar program in Louisiana, and this action was affirmed in a *per curiam* opinion of the Supreme Court dispensing with oral argument. Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), *aff'd mem.*, 455 U.S. 913 (1982). One part of the program at issue in *Treen* permitted voluntary observance of a minute for silent meditation at the start of the school day provided that the observance was neither intended nor identified as a religious exercise; this part of the program was not challenged by the plaintiffs and was unaffected by the decision.

More recently, a federal district court in Tennessee ruled unequivocally that a program calling for a moment of silent prayer or meditation violates the establishment clause. The court, after reviewing the leading Supreme Court cases and examining the legislative history, determined that the program would have the primary effect of fostering religion and had in fact been enacted by the Tennessee legislature for that purpose. Beck v. Mcelrath, 548 F. Supp. 1161 (M.D. Tenn. 1982). A similar program enacted recently in New Jersey is currently the subject of litigation in the federal courts.

A district court in Alabama recently dissolved its own prior order that had enjoined prayer programs, including a moment of silence for meditation or voluntary prayer, conducted by teachers in the Mobile, Alabama school system. The court reasoned that the many previous Supreme Court decisions applying the establishment clause and other provisions of the Bill of Rights to the states all had been incorrectly decided. Jaffree v. Board of School Comm'rs, 554 F.Supp. 1104 (S.D. Ala. 1983). Justice Powell, sitting as Circuit Justice, stayed the order of the district court (which had dissolved the injunction) pending final disposition of the appeal before the 11th Circuit. Jaffree v. Board of School Comm'rs, 103 S. Ct. 842 (1983) (Powell, Circuit Justice). The Eleventh Circuit reversed the district court's dismissal of the action and remanded with directions to issue and enforce an injunction prohibiting these prayer programs. Jaffree v. Wallace, No. 83-7046 (11th Cir., May 12, 1983).

The Supreme Court has also upheld the use of a state university's public facilities for student initiated religious activity in a case where that university generally served as a public forum and made its facilities available for the extracurricular activities of all religious and secular groups. Widmar v. Vincent, 454 U.S. 263 (1981). Courts have frequently drawn a sharp distinction between university and public school education in establishment clause cases based on the age and sophistication of the students involved. O'Hair v. Andrus, 613 F. 2d 931, 936 (D.D.C. 1979); *see* Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981); Tilton v. Richardson, 403 U.S. 672, 685-86 (1971). In addition to alluding to the possible distinction between public schools and colleges based on the maturity of the students, the Supreme Court in *Widmar v. Vincent* emphasized that the same facilities sought to be used in *Widmar* by student religious groups were, as a matter of long-standing university policy, deliberately made available to a wide variety of other student groups, more than 100 of which were officially recognized by the university. 454 U.S. at 270-75.

[21] *See, e.g.*, Hearings, *supra* note 4, at 182-96 (testimony of Reverend D. M. Kelly of the National Council of the Churches of Christ in the United States of America); *id.* at 203-04 (testimony of Reverend C. V. Bergstrom of the Lutheran Council in the U.S.A.); *id.* at 206-25 (statement of N. Z. Dershowitz on behalf of the National Jewish Community Relations Advisory Council and the Synagogue Council of America); *id.* at 312-30 (statement of G. Bushnell representing the Stated Clerk of the General Assembly of the United Presbyterian Church in the U.S.A.); Shriver, *Against School Prayer*, N.Y. Times, Oct. 7, 1982, at A27, col. 2. *See* 112 *Cong. Rec.* 23203 (1966) (remarks of Senator Bayh); *Prayers in Public Schools Opposed*, Christian Century, Jan. 9, 1952, at 35; Cahn, *On Government and Prayer*, 37 N.Y.U.L.Rev. 981, 993-94 (1962). Roger Williams and James Madison insisted on the complete separation of church and state, in large part because they believed that state sponsorship of religious views offends true believers and breeds disrespect for the state sponsored religion. *See infra* notes 72, 98-99 and accompanying text.

[22] *See* Note, *Toward a Constitutional Definition of Religion*, 91 Harv. L. Rev. 1056, 1069 (1978). *See also* United States v. Seeger, 380 U.S. 163, 174-75 (1965); School Dist. v. Schempp, 374 U.S. 203, 214 (1963).

[23] President's Message, *supra* note 3, at D45-46; *accord* H. Con. Res. 13, 98th Cong., 1st Sess. (1983) ("Resolved . . . that public school authorities should recognize the historic importance of religion to our civilization by encouraging short periods of silence").

[24] Hearings, *supra* note 4, at 82 (Memorandum of Department of Justice Office of Legal Policy) (hereinafter cited as "Justice Department Memorandum"); President's Message, *supra* note 3, at D45; *see also* Zorach v. Clauson, 343 U.S. 306, 313 (1952) ("We are a religious people whose institutions presuppose a Supreme Being.")

[25] See *infra* notes 73-80 and accompanying text.

[26] *See* Note, *supra* note 22, at 1069-72; United States v. Seeger, 380 U.S. 163, 174-75, 180-83 (1965).

[27] See *infra* notes 53-68 and accompanying text.

[28] 370 U.S. 421 (1962).

[29] The prayer was composed by the New York State Board of Regents, the governmental agency that supervises New York State's public school system.

[30] School officials could not comment on participation or nonparticipation, nor could they suggest or require that any posture or language or dress be used or not used. Upon written request from the parent, students were to be excused from saying the prayer or from the room. Engel v. Vitale, 370 U.S. 421, 438 (1962).

[31] *Id.* at 425.

[32] *Id.* at 429.

[33] 374 U.S. 203 (1963)

[34] *Id.* at 211.

[35] *Id.* at 205

[36] *Id.* at 207-08.

[37] *Id.* at 223.

[38] *Id.* at 205, 211-12 n.4.

[39] *Id.* at 224.

[40] *Id.* at 222.

[41] *Id.*

[42] *Id.* at 225.

[43] *Id.* at 225-26.

[44] *Id.* at 225.

[45] *Id.*

[46] *Id.* at 222 (citations omitted).

[47] 449 U.S. 39 (1980).

[48] *Id.* at 41.

[49] *Id.* at 42.

[50] *Id.*

[51] 455 U.S. 913 (1982), *aff'g* 653 F.2d 897 (5th Cir. 1981).

[52] 653 F.2d at 901.

[53] 330 U.S. 1 (1947).

[54] *See, e.g.*, Larkin v. Grendel's Den, Inc., 103 S. Ct. 505, 510-12 (1982); Larson v. Valente, 456 U.S. 228, 244-46 (1982); Meek v. Pittenger, 421 U.S. 349, 372 (1975); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 782 (1973); Tilton v. Richardson, 403 U.S. 672, 687-88 (1971); Lemon v. Kurtzman, 403 U.S. 602, 611-13 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 668-70, 676 (1970) (benevolent neutrality); Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968); Board of Educ. v. Allen, 392 U.S. 236, 242-43 (1968); School Dist. v. Schempp, 374 U.S. 203, 222 (1963); Zorach v. Clauson, 343 U.S. 306, 314 (1952) (neutrality not equivalent to hostility). *See generally* Note, *The Rights of Student Religious Groups Under the First Amendment To Hold Religious Meetings on the Public University Campus*, 33 Rutgers L. Rev. 1008, 1012-21 (1981).

[55] 330 U.S. 1, 15-16 (1947) (citation omitted). In *Everson*, the Court upheld the reimbursement program by analogy to other general public benefit programs, such as police and fire protection, which also served the schools. *Id.* at 17.

[56] *See, e.g.*, Larkin v. Grendel's Den, Inc., 103 S. Ct. 505, 510-12 (1982); Larson v. Valente, 456 U.S. 228 (1982); Widmar v. Vincent, 454 U.S. 263, 271-75 (1981); Stone v. Graham, 449 U.S. 39, 40 (1980) (per curiam); Epperson v. Arkansas, 393 U.S. 97, 107 (1968) (secular purpose test); School Dist. v. Schempp, 374 U.S. 203, 222 (1963) (primary effect).

[57] The primary effects test may operate as a double-check on the application of the more fundamental secular purpose test. *See* Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. Chi. L. Rev. 805, 825-26 (1978).

[58] *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 653 (1980); Wolman v. Walter, 443 U.S. 229, 235-44, 248-49, 254 (1977); Meek v. Pittenger, 421 U.S. 349, 358 (1975); Sloan v. Lemon, 413 U.S. 825, 829-32 (1973); Hunt v. McNair, 413 U.S. 734, 741 (1973); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472, 481-82 (1973); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772-73 (1973); Tilton v. Richardson, 403 U.S. 672, 678-79 (1971); Lemon v. Kurtzman, 403 U.S. 602 (1971); Board of Educ. v. Allen, 392 U.S. 236, 243 (1968).

[59] McGowan v. Maryland, 366 U.S. 420, 449 (1961) (secular purpose and effect); Gallagher v. Crown Kosher Super Mkt., 366 U.S. 617, 630 (1961) (secular purpose and effect); Braunfeld v. Brown, 366 U.S. 599, 607-08 (1961) (secular purpose).

[60] Walz v. Tax Comm'n, 397 U.S. 664, 674-75 (1970) (secular purpose, entanglement). The Court based its decision on its fear that the tax valuation of church property, including items used in ceremonies of worship, would inappropriately embroil the state in assigning value to things of a religious nature, and ultimately, in making judgments about religious things:

> We must also be sure that the end result—the effect [of taxation or exemption]—is not an excessive government entanglement with religion.
>
> . . . the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement.

Id. at 674. The entanglement criteria were further developed in Lemon v. Kurtzman, 403 U.S. 602, 622-24 (1971), where the Court also pointed to the dangers of divisiveness and factionalism engendered whenever government interfaces directly with religion. The Court recently reaffirmed the importance of guarding against the political and social risks of entanglement in *Larson v. Valente*, 456 U.S. 228, 244-55 (1982). *See also* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).

[61] Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969) (secular purpose).

[62] Zorach v. Clauson, 343 U.S. 306, 314 (1952).

[63] *See* Larson v. Valente, 456 U.S. 228, 244-55 (1982).

[64] *See* cases cited *supra* note 19.

[65] Lemon v. Kurtzman, 403 U.S. 602, 616 (1971).

[66] *Id.* at 616-17.

[67] Widmar v. Vincent, 454 U.S. 263 (1981); *see* Cox v. New Hampshire, 312 U.S. 569 (1941); O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979) (sustaining use of National Park for celebration of Roman Catholic Mass by the Pope). *See also* Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981) (sustaining regulation limiting manner of solicitation of donations to booths, as applied to members of religious group claiming that peripatetic solicitations constituted observance of its religious tenets).

[68] Walz v. Tax Comm'n, 397 U.S. 664 (1970).

[69] *See, e.g.*, Hearings, *supra* note 4, at 153-54 (testimony of G. L. Jarmin of the Project Prayer Coalition); *id.* at 255-56 (statement of E. C. Schmults, Deputy Attorney General, U.S. Department of Justice).

[70] *See generally* United States v. Ballard, 332 U.S. 78, 86-88 (1944). It is true that the framers' primary concern was to prevent the formation of an official federal church of the type that had existed in England. School Dist. v. Schempp, 374 U.S. 203, 237-38 (1963) (Brennan, J., concurring). There was also, however, a widespread awareness among many colonists of the dangers of any union between church and state. *Engel v. Vitale*, 370 U.S. 421, 429 (1962). In Virginia, in 1785-86, Thomas Jefferson and James Madison led the fight in opposition to Virginia's attempt to renew its tax levy in support of the established church. Madison wrote his famous *To the Honorable the General Assembly of the Commonwealth of Virginia, A Memorial and Remonstrance* (1785), *reprinted in* Everson v. Board of Educ., 330 U.S. 1, 63-72 (1947), *citing* II Writings of James Madison 183-91 (hereinafter cited as "*Memorial and Remonstrance*"), which received strong support. When the proposed tax levy came up for consideration, not only did it die in committee, but the Assembly enacted Jefferson's *Virginia Bill for Religious Liberty*. Everson v. Board of Educ., 330 U.S. at 12-13, *citing* 12 Hening, *Statutes of Virginia* 84 (1823); Commager, *Documents of American History* 125 (1944).

[71] *Memorial and Romonstrance*, *supra* note 70, ¶9.

[72] *Id.* ¶ 13. Roger Williams, described as "the truest Christian among many who sincerely desired to be Christians" and one of the earliest exponents of the doctrine of separation of church and state, believed that such a separation is necessary in order to protect religion from the danger of destruction which inevitably flows from control by even the best intentioned civil authority. *See* Engel v. Vitale, 370 U.S. 421, 434 n. 20 (1962), *citing* 1 Parrington, *Main Currents in American Thought* 74 (1930).

[73] *See, e.g.*, Tudor v. Board of Educ., 14 N.J. 31, 48, 100 A.2d 857, 868 (1953), *cert. denied*, 348 U.S. 816 (1954); O'Connor v. Hendrick, 109 A.D. 361, 368, 96 N.Y.S. 161, 167 (4th Dep't 1905), *aff'd*, 184 N.Y. 421, 77 N.E. 612 (1906); People *ex rel.* Ring v. Board of Educ., 245 Ill. 334, 346-47, 92 N.E. 251, 255 (1910); *see also* State *ex rel.* Finger v. Weedman, 55 S.D. 343, 357-58, 226 N.W. 348, 354 (1929); cases cited *infra* note 120. As Justice Brennan noted in his scholarly concurrence in *School Dist. v. Schempp*, 374 U.S. 203, 271 (1963): "Almost from the beginning religious exercises in the public schools have been the subject of intense criticism, vigorous debate, and judicial or

administrative prohibition."

[74] Lemon v. Kurtzman, 403 U.S. 602, 622 (1971).

[75] *See generally* L. Pfeffer, *Church, State and Freedom* 436-46, 449-50, 456-63, 479-95 (rev. ed. 1967).

[76] *Id.* at 438. Pfeffer points to other examples of such violence and strife. For example, according to Pfeffer, when a Catholic bishop in 1843 petitioned the Philadelphia school board to allow Catholic children to use the Catholic version of the Bible:

> The immediate effects of the Bishop's petition were both dramatic and tragic. For several months the controversy simmered, and then suddenly erupted in riots. Catholic churches were attacked; two in the Philadelphia suburb of Kensington were reduced to ashes. A convent was completely destroyed. Bishop Kenrick ordered all Catholic worship suspended and every Catholic church in the city closed; but this action did not avert the more serious consequences that the Bishop hoped it would. Many houses in the Irish section were destroyed by fire, some of the residents were shot down as they ran out, and a number of non-Catholic bystanders likewise lost their lives.

Id. at 437. In 1949, in Chelsea, Massachusetts, where the population was about 45% Catholic, 45% Jewish, and 10% Protestant, a request by two non-Catholic mothers to appear before the Chelsea School Committee to present their views against the singing of Christmas carols and the presentation of Christmas pageants in the schools caused serious controversy.

> The press immediately took up the issue. The Chelsea *Record* printed a banner headline, "Seek to Ban Singing of Carols in Public School." Boston papers carried similar headlines and slogans. Feelings ran high in Chelsea and Boston. . . . An indignant citizen clipped the Chelsea *Record*'s account of the petition and forwarded it to the House Committee on Un-American Activities in Washington.
>
> . . . .
>
> It is highly probable that the not too subtle hint of a boycott of Jewish merchants contained in the last paragraph of the editorial [published in an official organ of the Catholic archdiocese of Boston] was expressed often and much more directly in Chelsea.
>
> The intensity of community feeling and the threats of violence caused the Wolpers to leave Chelsea and go into hiding in a neighboring community. Mrs. Roller, the cosignor of the petition, was reported to have become almost hysterical as a result of the numerous telephone calls received.

Id. at 483-85.

[77] *Id.* at 462 (citations omitted). *See also id.* at 461-63.

[78] N.Y. Times, Dec. 12, 1982, §1, at 39, col. 1.

[79] N.Y. Times, Dec. 8, 1982, at B1, col. 1.

[80] B. Moyers, Commentary on CBS Evening News with Dan Rather 12 (Aug. 16, 1982). Significantly, the kindergarten teacher of the plaintiff's son did not realize she was causing discomfort to the child: "Actually, I didn't ever know that there were people that didn't say grace before they—at least grace before they ate." The school board president saw the issue as one of majority rule: "We're a nation founded under one God, and the majority of us believe in it. If there's a few people that don't, the majority has always ruled in this country." One caller to a local radio station stated: "And anybody that don't think there's a God, I mean, that doesn't think there's a God, I think that they are very, very sick." Another caller, when asked why she supported the law said, "Because I think it's right. I—I just think it's something that should be. And any parent that is against that should not be allowed to live in this country." *Id.* at 12-13.

[81] Justice Department Memorandum, *supra* note 24, at 107.

[82] The recent growth in this country in the number of unusual religious claims may render such political divisiveness over public prayer more likely than ever before. *See infra* text accompanying notes 90-96.

[83] *See supra* note 81.

[84] *See* Hearings, *supra* note 4, at 116 (Questions and Answers [of the White House] on the President's Proposed Voluntary School Prayer Amendment 2-3) (May 6, 1982) (hereinafter cited as "Questions and Answers"); Justice Department Memorandum, *supra* note 24, at 107-11.

[85] *Cf.* Justice Department Memorandum, *supra* note 24, at 106, 109 (student-initiated prayer at appropriate, nondisruptive times).

[86] *Id.* at 82, 103.

[87] Questions and Answers, *supra* note 84, at 116: "The Lord's Prayer and the Ten Commandments are reflections of our Judaeo-Christian heritage that could not fairly be described as instruments for the imposition of narrow sectarian dogmas on school children."

[88] *See, e.g.*, Hearings, *supra* note 4, at 138 (testimony of R. P. Dugan of the Office of Public Affairs of the National Association of Evangelicals).

[89] *See, e.g.*, Hearings, *supra* note 4, at 132 (testimony of Rabbi S. Siegel of the Jewish Theological Seminary of America); *id.* at 152 (statement of E. F. McAteer of the Religion Roundtable). *See also* Questions and Answers, *supra* note 84, at 116-17.

[90] *See supra* text accompanying notes 28-32 and 77.

[91] Note, *supra* note 22, at 1069, *quoting* Jamison, *Religions on the Christian Perimeter*, in 1 *Religion in American Life* 162 (J. Smith & A. Jamison eds. 1961).

[92] *Id.* (citations omitted).

[93] *See* authorities cited *supra* note 21.

[94] *See supra* text accompanying note 77.

[95] *See* Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961).

[96] *See supra* text accompaning note 77.

[97] *See* authorities cited *supra* note 21.

[98] *Memorial and Remonstrance*, *supra* note 70, ¶7.

[99] *Id.*

[100] *See* Engel v. Vitale, 370 U.S. 421, 431 (1962). *See also* Larson v. Valente, 456 U.S. 228, 253-54 (1982).

[101] Justice Department Memorandum, *supra* note 24, at 107-08.

[102] See *supra* notes 73-80 and accompanying text. The Supreme Court has recognized that aid to religion which benefits relatively few religious groups intensifies political fragmentation and divisiveness along religious lines. *See* Lemon v. Kurtzman, 403 U.S. 602, 623 (1971) (aid to religion neutral on its face but beneficiaries are 95% Catholic); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 795-96 (1973) (beneficiaries 85% Catholic). The mere use of religious exercises acceptable even to a very large majority certainly cannot eliminate, and may perhaps even exacerbate, the danger of coercion of religious minorities. Hence the danger, even in a predominantly Christian nation, of proposals to permit readings from the Christian Bible. *See, e.g.*, H.J. Res. 16, 98th Cong., 1st Sess. (1983) (reading from or listening to Biblical Scriptures).

[103] The phrase "public institutions" is undefined in the proposed amendment and could be quite broad. Proponents of S.J. Res. 73 apparently intend by this language to ensure that prayers of religious invocation will continue to be possible in courts and legislatures. *See, e.g.*, Justice Department Memorandum, *supra* note 24, at 111; Questions and Answers, *supra* note 84, at 116; Hearings, *supra* note 4, at 152 (statement of E. F. McAteer of the Religious Roundtable); *id.* at 255 (statement of E. C. Schmults, Deputy Attorney General, U.S. Department of Justice); *id.* at 154 (testimony of G. L.

Jarmin of the Project Prayer Coalition). It would appear, however, that an amendment for this purpose is not necessary since this type of activity has never been proscribed by the Supreme Court. *See* Zorach v. Clauson, 343 U.S. 306, 312-13 (1952). In *Chambers v. Marsh*, 675 F.2d 228 (8th Cir.), *cert. granted*, 103 S. Ct. 292 (1982), the Eighth Circuit held that the Nebraska legislature's practices of engaging the same Presbyterian minister to say an opening prayer every day and of paying for printed copies of such opening prayers amounted to a forbidden establishment of a religious viewpoint. Citing its earlier decision in *Bogen v. Doty*, 598 F.2d 1110 (8th Cir. 1979), the Eighth Circuit indicated in dictum that the practice of having clergymen recite brief ceremonial prayers at the beginning of each legislative session might not offend the establishment clause if participation in the exercise were voluntary, clergymen from different faiths were invited to conduct the prayers, no payment was made for the services, and the prayers were not recorded or published. 675 F.2d at 234. The Supreme Court has granted certiorari in the case. 103 S. Ct. 292 (1982).

The payment of salaries and certain expenses to chaplains employed by the United States Congress has also been challenged recently by a United States taxpayer. The taxpayer's standing to maintain the action was upheld by a panel of the District of Columbia Circuit in *Murray v. Buchanan*, 50 U.S.L.W. 2534 (D.C. Cir. Mar. 9, 1982), but this decision has been vacated pending rehearing en banc, 674 F.2d 8 (D.C. Cir. 1982). The panel also held that the practice was not immune from judicial review as a political question.

The use of the term "public institution" could have unanticipated and far ranging effects, since one may read the language as applying to any institution that receives public funds or is subject to public regulation. The history of the phrase "public accommodation" in civil rights legislation certainly suggests the extent to which a phrase such as "public institutions" may take on an extremely broad meaning. *See, e.g.*, Tillman v. Wheaton-Haven Recreation Ass'n, 410 U.S. 431 (1973) (club held not to be private where only restrictions on membership to a swimming club were geographical and a stated maximum number of memberships); Nesmith v. Young Men's Christian Ass'n, 397 F.2d 96 (4th Cir. 1968) (since places of public accommodation differ markedly in their operation, a factual determination must be made on the circumstances of each case); *cf.* S. 88, 98th Cong., 1st Sess. (1983) (religious meditation to be permitted "in any public building or in any building which is supported in whole or in part through the expenditure of Federal funds").

The potential breadth of the term "public institution" could result in the various problematic aspects of the amendment being multiplied many times throughout a potentially vast number of "public institutions." Arguments will doubtless be made that there is a need to compose nondenominational prayers, to select majority approved prayers, or to protect nonparticipants from coercion in all sorts of circumstances and publicly funded institutions, including clubs, parks, libraries, dormitories, athletic facilities, post offices, airports, and possibly even some apartments and commercial buildings. *Cf.* Questions and Answers, *supra* note 84, at 116 (indicating intention to permit prayer in public parks, prisons, hospitals, and legislatures). Although many of such arguments will be rejected by the courts, some will be accepted. We are concerned about the potential for government mandated religious exercises intruding into so many aspects of life and consuming large amounts of already overtaxed judicial resources.

[104] There is some authority for this interpretation of the amendment. *See* authority cited *supra* note 85.

[105] *See generally* Note, *supra* note 22, at 1056.

[106] Universal Military Training and Service Act, 50 U.S.C. App. §456(j) (1958).

[107] United States v. Seeger, 380 U.S. 163, 174,184 (1965).

[108] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Verner, 374 U.S.

398 (1963). *See also* Stevens v. Berger, 428 F. Supp. 896 (E.D.N.Y. 1977) (exemption from the requirement of obtaining Social Security number which respondent regarded as mark of the devil).

[109] 450 U.S. 707 (1981).

[110] *Id.* at 715-16.

[111] United States v. Kuch, 288 F. Supp. 439, 443 (D.D.C. 1968) (citation omitted).

[112] Members of the Church of the New Song, or Eclatarian faith, a prisoners' movement, have, for example, sought an accommodation of their beliefs in the federal prisons on religious free exercise grounds. The Church professes a belief in "Eclat," a being superior to Jesus and other spiritual leaders. The central principle of the Eclatarian faith is anti-authoritarian, concerned primarily with the destruction of repressive rulers particularly within the prison system and more generally within government and the judiciary. The lower federal courts have split on whether these tenets constitute a religion under the First Amendment. *See, e.g.*, Theriault v. Silber, 453 F. Supp. 254 (W.D. Tex. 1978), *on remand from* 547 F.2d 1279 (5th Cir. 1977), *vacating & remanding* 391 F. Supp. 578 (W.D. Tex. 1975), *on remand from* 495 F.2d 390 (5th Cir. 1974), *appeal dismissed*, 579 F.2d 302 (5th Cir. 1978), *cert. denied*, 440 U.S. 917 (1979); Hundley v. Sielaff, 407 F. Supp. 543 (D. Ill. 1975); Loney v. Scurr, 474 F. Supp. 1186 (S.D. Iowa 1979), *on remand from* Remmers v. Brewer, 529 F.2d 656 (8th Cir. 1976), *remanding* Remmers v. Brewer, 396 F. Supp. 145 (S.D. Iowa 1975); Remmers v. Brewer, 361 F. Supp. 537 (S.D. Iowa 1973), *aff'd per curiam*, 494 F.2d 1277 (8th Cir.), *cert. denied*, 419 U.S. 1012 (1974). A member of the International Society for Krishna Consciousness claimed in *United States v. Silberman*, 464 F. Supp 866, 870 (M.D. Fla. 1979), that the distribution of literature and solicitation of donations were aspects of his practice of religion. *See also* Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981), which considered the extent of the First Amendment right of the International Society for Krishna Consciousness to disseminate its religious materials. And members of the Native American Church argued successfully in *People v. Woody*, 61 Cal.2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964), that the use in the ceremonies of their church of peyote, a hallucinogen with a long history of use in the religious ceremonies of North American Indians, was religious within the meaning of the free exercise clause. In *State ex rel. Swann v. Pack*, 527 S.W.2d 99 (Tenn. 1975), *cert. denied* 424 U.S. 954 (1976), snake-handling as a rite undertaken to confirm the word of God under the tenets of the Holiness Church was carefully analyzed for its religious significance before being enjoined as a nuisance for which no method of accommodation could be found. In *United States v. Kuch*, 288 F. Supp. 439 (D.D.C. 1968), defendant, the primate of the Potomac of the Neo-American Church, a California not-for-profit corporation dedicated to the use of marijuana and LSD as the true sacraments, sought to use her religious beliefs as a defense to a criminal prosecution for illegal use and possession of controlled substances. The court took extensive evidence of the rituals and organization of the Neo-American Church, which paralleled and indeed seemed to parody that of established religions, before deciding that defendant's use of marijuana was not protected under the free exercise clause.

[113] 440 F.Supp. 1284 (D.N.J. 1977), *aff'd per curiam*, 592 F.2d 197 (3d Cir. 1979).

[114] 440 F. Supp. at 1305-12, 1323.

[115] For example, the Supreme Court has ruled that disputes within heirarchical churches must be determined exclusively by ecclesiastical courts, because state and federal courts are not competent to determine which faction, under church doctrine, has been faithful to the charter of the church. *See* Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960). *See also* Kedroff v. Saint Nicholas Cathedral, 344 U.S. 94 (1952);

United States v. Ballard, 322 U.S. 78 (1944); Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871). In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979), the Court refused to allow the NLRB to assume jurisdiction over teachers in parochial schools. The Court reasoned, in part, that the assertion of jurisdiction by the NLRB would inevitably require both that body and the courts to determine the merits of defenses to alleged unfair labor practices based on assertedly religious grounds. Justice Stevens has emphasized the wisdom of doctrines such as "neutrality" and "entanglement" that avoid litigation of religious doctrine. Larson v. Valente, 456 U.S. 228, 257 n.4 (1982) (concurring opinion); United States v. Lee, 455 U.S. 252, 263 n.2 (1982) (concurring opinion).

[116] United States v. Ballard, 322 U.S. 78, 86-87 (1944) (citation omitted); *accord, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940).

[117] Silent prayer is the focus of at least four of the proposed constitutional amendments now before the Congress. *See, e.g.*, H. Con. Res. 53, H. Con. Res. 38, H. Con. Res. 13, and H. Con. Res. 5 cited *supra* note 1.

[118] *See* Torcaso v. Watkins, 367 U.S. 488 (1961); *cf.* Wooley v. Maynard, 430 U.S. 705, 713-15 (1977) (state motto on license plate); Board of Educ. v. Barnette, 319 U.S. 624 (1943) (recitation of Pledge of Allegiance prior to inclusion of phrase "under God").

[119] *See, e.g.*, Mo. Const. art. I, §§6, 7, art IX, §8, interpreted to be more restrictive than the First Amendment in *Paster v. Tussey*, 512 S.W.2d 97, 101-02 (Mo. 1974) (en banc), *cert. denied*, 419 U.S. 1111 (1975); Tenn. Const. art. I, §3. In *Fox v. City of Los Angeles*, 22 Cal.3d 792, 796, 587 P.2d 663, 665, 150 Cal. Rptr. 867, 869 (1978), the Supreme Court of California noted that the then current United States Supreme Court interpretation of the establishment clause in the area of public funding might not be as comprehensive as Article I, Section 4 of the California constitution forbidding any preference for any religious doctrine.

[120] State *ex rel.* Clithero v. Showalter, 159 Wash. 519, 293 P. 1000 (1930); State *ex rel.* Dearle v. Frazier, 102 Wash. 369, 173 P. 35 (1918); Herold v. Parish Board of School Directors, 136 La. 1034, 68 So. 116 (1915); People *ex rel.* Ring v. Board of Educ., 245 Ill. 334, 92 N.E. 251 (1910); State *ex rel.* Freeman v. Scheve, 65 Neb. 876, 93 N.W. 169 (1903); State *ex rel.* Weiss v. District Board, 76 Wis. 177, 44 N.W. 967 (1890).

[121] People *ex rel.* Ring v. Board of Educ., 245 Ill. 334, 349, 92 N.E. 251, 255-56 (1910).

[122] Herold v. Parish Board of School Directors, 136 La. 1034, 1049-50, 68 So. 116, 121 (1915); State *ex rel.* Weiss v. District Board, 76 Wis. 177, 199-200, 44 N.W. 967, 975 (1890):

> The answer of the respondent states that the relators' children are not compelled to remain in the school-room while the Bible is being read, but are at liberty to withdraw therefrom during the reading of the same. For this reason it is claimed that the relators have no good cause for complaint, even though such reading be sectarian instruction. We cannot give our sanction to this position. When, as in this case, a small minority of the pupils in the public school is excluded, for any cause, from a stated school exercise, particularly when such cause is apparent hostility to the Bible, which a majority of the pupils have been taught to revere, from that moment the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion, and subjected to reproach and insult. But it is a sufficient refutation of the argument that the practice in question tends to destroy the equality of the pupils which the constitution seeks to establish and protect, and puts a portion of them to serious disadvantage in many ways with respect to the others.

[123] People *ex rel.* Ring v. Board of Educ., 245 Ill. 334, 346-47, 92 N.E. 251, 255 (1910); State *ex rel.* Dearle v. Frazier, 102 Wash. 369, 381, 173 P. 35, 39 (1918) ("it was known that religious opinion is a thing that men will fight for, and sometimes in most insidious ways").

[124] State *ex rel.* Dearle v. Frazier, 102 Wash. 369, 381, 173 P. 35, 39 (1918):

> To compromise opinion in these matters is to lead to confusion, which would make the courts the arbiter of what is and what is not religious worship, instruction, or influence, which would be as intolerable to the citizen as it would be to leave a decision to a school board.

[125] *See* Merel, *supra* note 57, at 810-11.

[126] Wisconsin v. Yoder, 406 U.S. 205 (1972); *see* Thomas v. Review Board of Indiana, 450 U.S. 707 (1981); Sherbert v. Verner, 374 U.S. 398, 410 (1963); Cantwell v. Connecticut, 310 U.S. 296 (1940); *cf.* Wooley v. Maynard, 430 U.S. 705 (1977) (state motto on license plate).

[127] Such practical difficulties surely cannot be resolved by constitutional amendments, such as H. Con. Res. 14, 98th Cong., 1st Sess. (1983), which simply proclaim "that individual religious conscience should not be violated or compromised in the establishment or operation of such periods of stillness and silence."

[128] Note, *School Prayer and the Becker Amendment*, 53 Geo. L.J. 192, 219 (1964).

[129] Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948).

[130] *Id.* at 227-28 (separate opinion of Frankfurter, J.)

[131] Justice Department Memorandum, *supra* note 24, at 105.

[132] State *ex rel.* Freeman v. Scheve, 65 Neb. 876, 880, 93 N.W. 169, 170 (1903).

[133] 374 U.S. 203, 208 (1963).

[134] *See, e.g.*, Tudor v. Board of Educ., 14 N.J. 31, 48-51, 100 A.2d 857, 866-68 (1953), *cert. denied*, 348 U.S. 816 (1954); State *ex rel.* Weiss v. District Board, 76 Wis. 177, 199-200, 44 N.W. 967, 975 (1890).

[135] *See* Larson v. Valente, 456 U.S. 228 (1982); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

[136] In Pierce v. Society of Sisters, 268 U.S. 510 (1925), the Supreme Court upheld the right of parents to send their children to private and parochial schools in satisfaction of public education requirements. In the more recent case of *Wisconsin v. Yoder*, 406 U.S. 205 (1972), Amish children were excused from public education requirements beyond the eighth grade because of the extent to which the public school system interferes with the inculcation by the Amish community of religious values in their children. *See also* Prince v. Massachusetts, 321 U.S. 158, 165-66 (1944) (dictum).

[137] Permitting such voluntary prayer before meals or before or after school is one purpose of the proposed amendment. See Justice Department Memorandum, *supra* note 24, at 109. Several courts have addressed the constitutionality of student-initiated prayer in school facilities during non-school hours. The most recent decisions indicate that, while truly voluntary prayers might be possible in theory, it will be very difficult in practice to satisfy the requirements of neutrality. For example, in *Brandon v. Board of Educ.*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981), the "Students for Voluntary Prayer" sought permission to conduct communal prayer meetings in a high school classroom immediately before the morning homeroom period. The meetings were wholly student initiated and were to be unsupervised and separated from all other school functions. The school board had refused to grant permission. The court concluded that, since the voluntary prayer meetings would have to be conducted after the arrival of the school buses at school, and therefore after the official school day began, "[t]he prayer meetings would create an improper appearance of official support." *Id.* at 979. *Accord* Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 800 (1983); Karen B.

v. Treen, 653 F.2d 897 (5th Cir. 1981), *aff'd mem.*, 455 U.S. 913 (1982); Collins v. Chandler Unified School Dist., 644 F.2d 759 (9th Cir.), *cert. denied*, 454 U.S. 863 (1981). One early case, *Reed v.Van Hoven*, 237 F. Supp. 48 (W.D. Mich. 1965), conditionally suggested a detailed regime of a pre-school day, voluntary, student initiated school prayer program as a means of resolving a school prayer litigation without trial. Neither the prayer sessions nor the participants were to be highlighted in any way, and the teachers' only responsibility was to maintain order. The court had to set forth rather elaborate precautions and methods of monitoring the program to avoid any appearance of official sponsorship or stigma for nonattendance. *Id.* at 54-55. Whether a public school normally functions as a "public forum" comparable to that of a park or college campus may rightly be determinative. *See* Widmar v. Vincent, 454 U.S. 263, 271 n.10 (1981). Presumably a high school, the facilities of which were made available during nonschool hours without distinction to a large number of speakers and organizations, could make the facilities equally available to religious groups, for conducting voluntary prayer and other religious activities, provided steps were taken to avoid any overlap with school hours or apearance of sponsorship by the school. Indeed, after this Report was set in print, but before publication, the Middle District of Pennsylvania held that a school district that established a regularly-scheduled activity period to organize clubs and groups and hold meeting at the school could not deny a request by a wholly student initiated prayer club to meet at school facilities during the activity period to read scriptures, pray, and engage in other activities of interest to the group. Bender v. Williamsport Area School Dist. No 82-0692 (M.D. Pa May 12, 1983).

[138] *See* Lemon v. Kurtzman, 403 U.S. 602, 618-19 (1971):

> [A] dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral.
>
> . . . .
>
> A comprehensive, discriminating, and continuing state surveillance will inevitably be required. . . . Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment.

[139] Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967).

[140] It has been suggested that school districts will not, under S.J. Res. 73, impose particular religious doctrines on school children because, in part:

> The Lord's Prayer and the Ten Commandments are reflections of our Judaeo-Christian heritage that could not fairly be described as instruments for the imposition of narrow sectarian dogmas on school children. Indeed, any reference to a "personal" God who is more than a mere "life-force" might be "denominational" insofar as it reflected the general beliefs of Judaism and Christianity to the exclusion of those who reject the idea of a personal God.

Quesions and Answers, *supra* note 84, at 116-17.

[141] *See Memorial and Remonstrance*, *supra* note 70, ¶9: "Instead of holding forth an asylum to the persecuted, [the Bill] is itself a signal of persecution. . . . Distant as it may be, in its present form, from the Inquisition it differs from it only in degree. The one is the first step, the other the last in a career of intolerance." The Supreme Court warned in *Engel v. Vitale*, 370 U.S. 421, 429-30 (1962):

> [O]ne of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services . . . .

The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say—that the people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office.

Senator HATCH. Mr. Freitag?

STATEMENT OF BERNIE FREITAG

Mr. FREITAG. Thank you, Mr. Chairman. The NEA represents 1,700,000 teachers and educational support personnel throughout these United States. We are grateful for this opportunity to present the NEA's views on this most significant subject of prayer in tbe Nation's schools. We are especially pleased to be able to voice our opinion on school prayer, since it is the public school teachers among our members who will be at the center of activity if this amendment were added to the constitution.

If Senate Joint Resolution 73 passes the Congress and is ratified by the States, public school teachers would become the leaders of daily prayer exercises in the classrooms of America. Mr. Chairman, it is the mandate of NEA members that we express their strong objections to this constitutional amendment concerning voluntary prayer in the schools.

At the most recent meeting of NEA's highest governing body, our representative assembly, the more than 7,500 delegates elected by our local and State affiliates reaffirmed a resolution first passed by that body in 1978 and reaffirmed each year since then.

It states in part, "The Association opposes the imposition of sectarian practices in the public school program and urges its affiliates to do the same."

The NEA supports the 1962 Supreme Court decision in *Engel* v. *Vitale* on prayer in the public schools, a ruling that prohibited neither prayer nor Bible reading in the schools. What the decision did prohibit was the State sponsorship of prayer in the schools, or, to put it more bluntly, mandatory "voluntary" prayer.

That 1962 Supreme Court decision and numerous lower Federal court rulings since then have underscored the separation of church and state in this country, one of the founding principles upon which this great Nation has been built.

We believe, therefore, that this amendment cannot remove the first amendment rights of Americans.

The current attempt to pass an amendment to the Constitution mandating "voluntary" prayer in the schools is part of a larger move to change social policy, a move, I might add, supported predominantly by the right wing. Moves to alter the U.S. Constitution in the past have mainly been attempts to expand individual rights and to increase the efficiency of the operation of Government.

Now, however, it appears that changes in this most precious of human documents are being sought to dictate social policy. It may be remembered that these same forces pushing for social change through the Constitution have for years had a hands off attitude toward the judicial interpretation of law, denouncing it as a means to dictate social policy.

Now, however, dictating their social policy through changes in the Constitution is suddenly an acceptable practice. The NEA believes this is a dangerous, not to mention hypocritical, threat to the foundation of our Government.

Conservative columnist James Kilpatrick raised another point in the Baltimore Sun. This column has been syndicated widely. And he says, "One problem with institutional prayer parallels the problem one often encountered with institutional food. The group prayers that would be sanctioned by this amendment would be canned peas, bland, innocuous, inoffensive recitations, perfunctory rituals devoid of spiritual meaning. Heartfelt prayer demands something more."

A column written by Samuel Shaffer, retired chief congressional correspondent for Newsweek magazine, published in the Washington Post, underscores many of the important points made by Mr. Kilpatrick. Both of those are attached to this statement.

The group prayer might be innocuous to some and offensive to others. We ask Congress to realize that it is our members who will be required to lead the prayer. I might note that I am quite certain that if public school teachers were removed from the Nation's Sunday schools and synagogue schools each week, we would find literally hundreds of thousands of empty seats in places of worship throughout the land.

But asking these same deeply religious people to stand at the head of a classroom to lead a prayer chosen by others is an infringement of their religious rights. In addition, as with students, teachers who choose not to pray are put into a precarious position. If they choose to exercise their constitutional rights and leave the classroom during prayer, there will most likely be a price to pay.

Under current prevailing school codes, this could be treated as insubordination, and it could also result in an evaluation rating of unsatisfactory, which could lead to dismissal.

The NEA asks why there is a need to put students' and teachers' principles on the line when schools may use the Bible or other religious books as source books in religion classes; may offer a course in the Bible as literature and history; may offer instruction in comparative religion; and when schools may be rented in off hours to religious groups.

In addition, under current law, students may be allowed to leave school premises to receive religious instruction and may study the history of religion and its role in civilization.

In closing, I urge this committee to reject the constitutional amendment on school prayer and by doing so, it will preserve a basic American right for children and their teachers, the right to pray voluntarily without the taint of government mandate or peer pressure.

Thank you very much.

[The prepared statement of the National Education Association follows:]

PREPARED STATEMENT OF THE NATIONAL EDUCATION ASSOCIATION

PRESENTED BY, BERNIE FREITAG, VICE-PRESIDENT

Mr. Chairman and Members of the Committee, my name is Bernie Freitag, and I am the Vice-President of the National Education Association (NEA). The NEA represents 1.7 million teachers and educational support personnel throughout these United States.

I thank you for this opportunity to present the NEA's views on this most significant subject of prayer in the nation's schools. We are especially pleased to be able to voice our opinion on school prayer, since it is the public school teachers among our members who will be at the center of activity if this amendment were added to the Constitution. If S.J. Res. 73 passes the Congress and is ratified by the states, public school teachers would become the leaders of daily prayer exercises in the classrooms of America. Mr. Chairman, it is the mandate of NEA members that we express their strong objections to this constitutional amendment mandating voluntary prayer in the schools.

At the most recent meeting of NEA's highest governing body, our Representative Assembly, the more than 7,500 elected delegates reaffirmed a resolution first passed by that body in 1978 and reaffirmed each year since then. It states:

> "The National Education Association believes that the constitutional provisions on the establishment of and the free exercise of religion in the First Amendment require that there be no sectarian practices in the public school program.
>
> "The Association opposes the imposition of sectarian practices in the public school program and urges its affiliates to do the same."

NEA objects to state sponsorship of prayer

The NEA supports the 1962 Supreme Court decision in Engle v. Vitale on prayer in the public schools, a ruling that prohibited neither prayer nor Bible reading in the schools. What the decision did prohibit was the state sponsorship of prayer in the schools, or, to put it more bluntly, mandatory "voluntary" prayer.

That 1962 Supreme Court decision, and numerous lower federal court rulings since then, have underscored the separation of church and state in this country, one of the founding principles on which this great nation has been built. Indeed, the very first words of the Constitution's First Amendment are emphatic: "Congress shall make no law respecting an establishment of religion." The Fourteenth Amendment carries the same restriction to state and local governments. And the Supreme Court has consistently and unequivocally upheld this wall of separation between church and state. It is clear, then, that these interpretations mean that the state, through its schools, must not sponsor religion.

We believe therefore that this amendment cannot remove the First Amendment rights of Americans.

NEA opposes mandating social policy

The current attempt to pass an amendment to the Constitution mandating "voluntary" prayer in the schools is part of a larger move to change social policy--a move I might add, supported predominantly by the right wing.

Moves to alter the U.S. Constitution in the past have mainly been attempts to expand individual rights and to increase the efficiency of the operation of government. Now, however, it appears that changes in this most precious of human documents are being sought to dictate social policy. It may be remembered that these same forces pushing for social change through the Constitution have for years had a hands-off attitude toward the judicial interpretation of law, denouncing it as a means to "dictate" social policy. Now, however, "dictating" their social policy through changes in the Constitution is suddenly an acceptable practice. The NEA believes this is a dangerous--not to mention hypocritical--threat to the foundation of our government.

NEA asks, "Who's prayer will be used?"

Another key point on which the NEA opposes the adoption of a constitutional amendment on school prayer rests in its strong belief in the diversity of America--a diversity preserved by our Bill of Rights.

Now all students are free to silently worship in whatever form they choose in the classroom. Certain commentators have noted that as long as there are tests in school there will be voluntary prayers. Whether the students belong to the Buddhist, Jewish, Hindu, or Muslem faiths, or any other number of religious minority groups in the country, their rights to their own prayer are not infringed upon in any way. If so-called "voluntary" group (essentially mandatory) prayer becomes the law of the land, what becomes of this diversity? Who chooses what prayers shall be recited? What happens to the current freedom to worship through one's own chosen prayer?

Conservative columnist James Kilpatrick put it succinctly in the Baltimore Sun, and syndicated widely:

> "... one problem with institutional prayer parallels the problem one often encountered with institutional food. The group prayers that would be sanctioned by this amendment would be canned peas--bland, innocuous, inoffensive recitations, perfunctory rituals devoid of spiritual meaning. Heartfelt prayer demands something more."

A column written by Samuel Shaffer, retired chief Congressional correspondent for Newsweek magazine, published in the Washington Post, underscores many of the important points made by Mr. Kilpatrick. (Both columns are attached to the statement.)

The group prayer might be innocuous to some and offensive to others. We ask Congress to realize that it is our members who will be required to lead the prayer. I might note that I'm quite certain that if public school teachers were removed from the nation's Sunday schools and synagogue schools each week, we would find literally hundreds of thousands of empty seats in places of worship throughout the land.

But asking these same deeply religious people to stand at the head of a classroom to lead a prayer chosen by others is an infringement of their religious rights. In addition, as with students, teachers who choose not to pray are put into a precarious position. If they choose to exercise their constitutional rights and leave the classroom during prayer, there will most likely be a price to pay. Under current prevailing school codes this could be treated as insubordination? And it could also result in an evaluation rating of unsatisfactory--which could lead to dismissal.

The NEA asks why there is a need to put students' and teachers' principles on the line when schools:

- may use the Bible or other religious books as source books in religion classes;
- may offer a course in the Bible as literature and history;
- may offer instruction in comparative religion;
- may be rented in off-hours to religious groups.

In addition, under current law, students:

- may be allowed to leave school premises to receive religious instruction, and
- may study the history of religion and its role in civilization.

In closing, I urge this Committee to reject the constitutional amendment on school prayer, and by doing so it will preserve a basic American right for children and their teachers--the right to pray voluntarily without taint of government mandate or peer pressure.

Thank you so much for this opportunity to be here today.

Attachment A

Resolution first adopted by the NEA 1978 Representative Assembly and reaffirmed in 1979, 1980, 1981 and 1982

> The National Education Association believes that the constitutional provisions on the establishment of and the free exercise of religion in the First Amendment require that there be no sectarian practices in the public school program.
>
> The Association opposes the imposition of sectarian practices in the public school program and urges its affiliates to do the same. (78, 79)

[From the Baltimore Sun, May 29, 1982]

FIRST, A MOMENT OF SILENCE

(By James J. Kilpatrick)

PRAYER IN SCHOOL

WASHINGTON.—President Reagan has just sent to Capitol Hill his proposed constitutional amendment on prayer in public schools. If wisdom and prudence prevail, the resolution will be quietly buried in the judiciary committees.

Sad to say, wisdom and prudence seldom prevail in an election year. This resolution will be a tough one to vote against. Mr. Reagan would write into the Constitution this provision:

"Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any state to participate in prayer."

Several things are wrong with this proposition. For one thing, "individual prayer" never has been prohibited by any court at any time. Nothing on earth prevents a school child from bowing his head over his desk and saying a silent prayer whenever he feels so disposed.

Neither have the courts had a word to say about prayer in "other public institutions." Over the years, various atheistic petitioners have complained of prayer in the houses of Congress, in state legislatures and at military installations. Sessions of the Supreme Court itself are opened with prayer: "God save this honorable Court!" To the extent that the amendment seeks to authorize a custom that is nowhere prohibited, the amendment is quite simply unnecessary.

The issue involves one subject only: group prayer is public schools. That is what we are talking about, and it is all we are talking about. Let me argue a case against it.

First, on this matter of "voluntarism." The Reagan draft says, in effect, that no child shall be required to participate in a group prayer. As a practical matter, the saving sentence has no meaning. Attendance at a public school is compulsory; the child has to be there. Few children ever would risk the conspicuous embarrassment of refusing to do what the teacher and other children are doing. Saying that classroom prayer is voluntary cannot make it so.

Second, the amendment's protection of "group prayer" plainly implies a structured, organized service of some kind. But what kind? Are state boards of education to provide an official prayer for use statewide? Is every local board to compose its own? Is the group to be led by individual teachers or pupils? Once we embrace the idea of "group prayer," we embrace laws respecting an establishment of religion. The First Amendment has prohibited such laws for nearly 200 years. Do we truly want to cast that long experience aside?

Third, one problem with institutional prayer parallels the problem often encountered with institutional food. The group prayers that would be sanctioned by this amendment would be canned peas—bland, innocuous, inoffensive recitations, perfunctory rituals devoid of spiritual meaning. Heartfelt prayer demands something more.

Mr. Reagan is quite in error in his view of the present state of the law. He says that the high court "has effectively removed prayer from our classrooms," but it is only institutionalized prayer that the court has condemned. The president says his amendment "will restore the right to pray," but so far as the individual child is concerned, that right never has been suspended.

In his statement of May 6, the president asked a rhetorical question: "How can we hope to retain our freedom through the generations if we fail to teach our young that our liberty springs from an abiding faith in our Creator?" Some of us might respond by suggesting that our liberty springs from something else entirely. Our free institutions may have been divinely inspired, but they are rooted in mortal instruments—the rule of law, the common defense, a written Constitution. Faith in our Creator is a thing apart, a matter of personal conviction, not of public policy.

Before we drift toward some quasi-state-sanctioned establishment of religion let us have a long moment of meditative silence.

[From the Washington Post, Aug. 12, 1982]

WHEN THEY PRAYED IN SCHOOL

(By Samuel Shaffer [1])

The continuing controversy about restoring public school prayers brings back memories of religion in the public schools of the District of Columbia in the 1920s, when I was attending grammar and high school here.

This was the compulsory procedure in the schoolroom before instruction began: first, we had to extend the right arm and hand, in a gesture afterwards adopted by Benito Mussolini, and pledge allegiance to the flag.

Then came the religious part of the morning's activities. Whether it was due to a rider on a D.C. appropriations bill slipped through Congress or a ruling by the D.C. school board was never explained to us.

First, the teacher had to lead the class in a recitation of the Lord's Prayer. This resulted in tension between the Protestant and Catholic children because the latter refused to say the concluding words: "For Thine is the kingdom and the power and the glory, forever and ever, Amen." After class, this led to taunts and occasional fistfights.

The first sentence of the prayer presented a curious difficulty for some of us who said, in our blessed ignorance: "Our Father who art in Heaven, Harold be thy name." It wasn't until years later, when I discovered H.L. Mencken, that I learned the Creator's name was Yahweh, not Harold, and that I should have said "hallowed."

This was followed by a reading from the Bible. The teacher could select any passage, but that passage had to be an entire chapter.

My section chief in high school was Carlos Blume, a German teacher, who, incidentally, was never seen to eat anything for lunch but cold fried-egg sandwiches that he brought from his boarding house.

By his own admission, made privately to some favored students, Carolos Blume was "a village atheist." And so day after day he read the same chapter—Chapter 5 of the Book of Genesis—thus obeying the letter of the law while utterly violating its spirit.

My memory is still haunted by some of the verses: "And Seth lived a hundred and five years and begat Enos; and Seth lived after he begat Enos eight hundred and seven years and begat sons and daughters; and all the days of Seth were nine hundred and five years; and he died."

And so we learned about the extraordinary life expectancy and conjugal vigor of Cainan (who began Mahalaleel) and Jared and Enoch (who begat Methusaleh). Always there came the dying fall: "And then he died."

We knew when those words would come and spontaneously with Carolos Blume, we chimed in.

Thus inspired, we faced our scholarly tasks with renewed vigor and hope.

Senator HATCH. Thank you. We appreciate the testimony you have given. And in your case, Ms. Merel, you have put a lot of effort into this. You have a very long statement with a lot of citations, and we particularly appreciate that type of effort.

If a student or his parents desire not to participate in a sensitive class on sex education, for example, we try to accommodate that person by allowing him not to participate. We do not deny the opportunity to anyone else to participate. Why should not this same principle control in attempting to accommodate everybody's interests in the area of school prayer?

Mr. FREITAG. Mr. Chairman, elective courses are exactly that, elective, and students are quite practiced in realizing that they will find some of their classmates in one course and some in another. So I am not sure that the arguments about it being the same kind of peer pressure are valid.

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[1] The writer is the retired chief congressional correspondent for Newsweek magazine.

I think it is difficult for children when their parents have become very vocal and dramatize their personal situation; then public attention is drawn to them.

But I doubt very much that students make check lists of who shows up for what course and use the lists to exert some kind of peer pressure.

Senator HATCH. Have any of you studied the experience of the Nation prior to Engel and Abington with regard to the practice of school prayer? What I would like to know is were there any of the horror stories that opponents of prayer assure us will take place if we pass this amendment?

Mr. DUNN. Yes, sir, could I speak to that?

Senator HATCH. Sure.

Mr. DUNN. There are several of those stories available by talking to religious minorities who were in positions where a prevailing Protestant majority, generally, dominated. In fact, in the 1950's and 1960's, a good deal of the opposition to the school prayer idea came from Roman Catholic churches because of the use of the Protestant Bible.

Another point, in a study cited by Al Menendez of Americans United for Separation of Church and State, points out quite clearly that surveys indicate that all Americans were not engaged in public school prayers before the decisions in the 1960's. In the Midwest and the West and a whole lot of America it is simply not true that the school day was opened with school prayer.

In fact, on the basis of very fragmentary studies that have been done—and admittedly there is not a careful, empirical study—it seems that a majority of American schools were not caught up in the use of religious exercise in the public school day. It was only a minority that were involved. I cannot resist making one other point about that 170 years.

Senator HATCH. Sure. You have every right to.

Mr. DUNN. It has been pointed out repeatedly that all these years we had school prayer. I think there is some doubt about whether we had school prayer all those years.

Senator HATCH. We had a lot more than school prayer during many of those years, too. We had actual Government assistance to religion.

Mr. DUNN. Yes. We did not have school prayer all those years. We did not have it universally where it was practiced. All those years we also had slavery. But we went through a great deal of tension and the ultimate divisiveness over the question of slavery. And just because it was practiced, it does not mean it was right.

Senator HATCH. You are not comparing the issue of school prayer with the issue of slavery?

Mr. DUNN. Yes, sir, I am, because at this point I am comparing them because it is constantly raised as an argument that since we had school prayer for x number of years, it was therefore right.

But those same people, if pressed, would not argue that since we had slavery that it was right.

Senator HATCH. Let me just ask Reverend Dugan now, you represent the Baptist Church as well, or at least certain segments of the Baptists.

Why is there a difference between the two of your testimonies?

Mr. **Dugan**. I was president of my denomination. It is very small compared to the Southern Baptist Convention of which Rev. James Dunn is a member. And his own convention by about a 3 to 1 vote in their national meeting last summer endorsed the concept, in general, of prayer in schools. Although, as he has cited, some of the State conventions have spoken otherwise.

Senator **Hatch**. Wait, wait; let me understand what you are saying. You are saying that his convention——

Mr. **Dugan**. The Southern Baptist Convention. He represents the—well, I should not be answering for him. The Baptist Joint Committee is of many denominations, but his own denomination by a 3 to 1 vote—the Southern Baptist Convention, the largest Baptist denomination in the country with over 13 million members, by a 3 to 1 vote at its convention, supported the concept of prayer in schools last summer.

My own denomination does as well.

Senator **Hatch**. I am just trying to distinguish because it is hard for me to understand the reason for the differences in your testimonies.

Mr. **Dugan**. Baptists are individualistic historically, and they are not connectional in terms of denominational hierarchies where values and positions are imposed from the top.

Senator **Hatch**. Do you dispute that Mr. Dunn represents 20 million people when he says that he does not think school prayer is a good thing?

Mr. **Dugan**. I have no way of knowing the statistics among his own—the members of the Baptist Joint Committee. I only say that my denomination is not a member of that, and lots of Baptists are evangelicals and they seem generally in favor of prayer.

Senator **Hatch**. OK, Mr. Dunn, and then I want to get to Ms. Merel here on this other point.

Mr. **Dunn**. I must point out, because there was a little bit of confusion about the Southern Baptist Convention action in June 1982, that in the fall of 1982 10 of the State conventions repudiated that action because we thought it was hasty, mistaken, and an aberration. And those 10 State conventions were no small bodies of Baptists. They were the Texas Convention, the Louisiana, Arkansas, Missouri, and Alabama.

Senator **Hatch**. Would you say the votes were overwhelmingly against school prayer?

Mr. **Dunn**. Yes. Overwhelming and a far greater number of persons in each of those conventions than constituted the makeup on the floor of the convention in New Orleans, when the Southern Baptist Convention voted the action: Alabama, Tennessee, Kentucky, Virginia, and Maryland. These conventions repudiated that action of the Southern Baptist Convention in June 1982, and therefore are on record.

Senator **Hatch**. Just for our record would you say that the representatives of the vast majority of Baptists in this country, contrary to those that Reverend Dugan represents, would be against public school prayer?

Mr. **Dunn**. Yes, sir. The majority of the Baptist conventions in this Nation that have voted, the overwhelming majority of the Baptist conventions in this Nation that have voted on a resolution that speaks to the school prayer issue, have voted in opposition to it: the American Baptist Church, the Progressive Baptist Church, the 10 State conventions I just listed for you, and other Baptist conventions have voted in opposition.

Senator HATCH. Now, are these the ministers or are these the people? I mean, do they really represent——

Mr. DUNN. They are ministers who are also people, and the other people in those State conventions, the messengers and delegates. Even the ministers have a vote in those conventions. I understand what you mean, but it is not just the hierarchy.

Senator HATCH. Do you have any dispute with that, Reverend Dugan.

Mr. DUGAN. I need to clarify. I am not here as a Baptist. I am personally a Baptist minister by background. I represent the National Association of Evangelicals, which has 43 member denominations and churches from another 35 or so denominations, and thus I am expressing what they have declared by official resolution; the leadership of those people at national conventions two or three times since the Supreme Court decisions, their position; so it represents a broad spectrum, 73 member denominations or so or churches from 73 denominations.

So I do not speak for Baptists, as such. The Reverend Mr. Dunn does specifically.

Senator HATCH. I see. I have been under the impression as I have gone around the country, that most Baptists would like to see prayer in the schools and fit within the 80 percent of those who the polls seem to show want prayer in the schools.

Mr. DUNN. I do not share that impression.

Senator HATCH. You do not.

Mr. DUNN. Because there is a distinctive Baptist history that began with Roger Williams in this country that focused on religious liberty and affirmed the rights of those who hold to whatever religious views they would, whether they be Jews or atheists or whatever.

Senator HATCH. Are you quoting Roger Williams?

Mr. DUNN. Yes, sir.

Senator HATCH. Roger Williams, as I understand, left the Baptist Church.

Mr. DUNN. Well, he was a sometimes Baptist. He was a Baptist when he——

Senator HATCH. He was all right when he agreed with you, then.

Mr. DUNN. That's right. He brought religious liberty to these shores.

Senator HATCH. He brought religious liberty to this hemisphere. And frankly, as I understand it, became disconcerted with his own religion and went off and taught Christ to the Indians.

Mr. DUNN. That is right.

Senator HATCH. That is correct?

Mr. DUNN. That is right. That is correct.

Senator HATCH. Do you think Roger Williams would support your position here today?

Mr. DUNN. Yes, sir, I think he definitely would.

Senator HATCH. I do not. But nevertheless, that is just a dispute. Ms. Merel?

Ms. MEREL. Yes. I wanted to come back very briefly to both of your questions.

Senator HATCH. Sure.

Ms. MEREL. We do point out in our report that, in fact, controversies over school prayer generally ended, rather than began, in New York with Engel and that, consistent with statements made earlier, there has been a great deal of controversy over the version of Bible or the form of prayer to be used in school prayer exercises.

I am particularly interested in responding to your question about sex education in the schools. It is the view of the association that it is inappropriate for government to take a position about religious things, and that our Government is properly secular.

I would like to emphasize that secular is not the opposite of religious. The opposite of religion is irreligion or antireligion, but the basis of government is secular. Government should not take positions about whether irreligious or antireligious or proreligious beliefs are appropriate. If a governmental including a school authority decides to do something about sex education, we may find that that decision is good or bad or wise or unwise, but it is about a matter that is secular, not religious. And, therefore, it is not equivalent to taking a position on religious matters.

Senator HATCH. Yes, go ahead, Mr. Freitag. Go ahead.

Mr. FREITAG. I would like to respond to your question about the time during which we did have religious exercises in the public schools. I would like to say first that before I became a teacher in the public schools, I was a religious—a member of the Brothers of the Christian Schools teaching in Catholic schools. Next I taught in Catholic high school as a layperson before I became a teacher in the public school.

So when I arrived within the public school system and was told that morning exercises would begin with the Pledge of Allegiance, Bible reading, and a moment of silent prayer, I was more than happy to participate.

But I learned that it was very different in the public school system, given the couple of years that I experienced it before the practice was stopped. Even in the Catholic school system, in a totally Catholic school, it was difficult at times to maintain the proper respect and attitude throughout a prayer observance within the school. That is just the nature of young people. It should not surprise any of us.

But I found out that in the schools of Bucks County, PA, where I teach, which has a mixture of Quaker, Protestant denominations, and Roman Catholics, it was even much more difficult to maintain the proper atmosphere of respect and piety during those morning exercises. Rotating the Bible reading among the students was particularly difficult because although they did not choose to leave the room, many would not want to read. It was a chore that was unpleasant because in a setting that was designed to get the day off to a good start you had a host of interpersonal confrontations that did just the opposite.

Frankly I was very glad when the practice was stopped.

Senator HATCH. I see. Now, Mr. Freitag, as a representative of the NEA, do you see any relationship between the decline in moral education typified by *Engel* and *Abington* in the 1960's and the conclusion of the Commission on Education, that the quality of American education has been declining almost constantly since that time.

Does the NEA see any correlation in that? Do you personally see any correlation? Would you disagree with those who do see a definite correlation?

Mr. FREITAG. Well, I have yet to see any real substantiation of the fact that there is a ceasing of good moral attitude in the public schools. That is to say, I believe that the teachers, at least as role models———

Senator HATCH. Nobody is talking about a ceasing. They are talking about a decline in moral education.

Mr. FREITAG. Well, I do not know what is offered as a measure of that, either as it once was or the decline to what it is now.

I have been teaching for over 22, 23 years. I have had the pleasure of being associated with persons that I think are outstanding, and unless I had something more specific to relate to, Senator, I am not able to help you.

Senator HATCH. OK. Ms. Merel, given that the average student is in school at least 8 hours every day and exposed to education in such diverse areas as political science, political education, physical education, hygiene, driver's education, philosophy, sex education, and so forth, why is it inappropriate for the schools to offer an opportunity, the mere opportunity for any student to be exposed to a moment of meditation?

Given that the student spends such a significant portion of his days in the public schools, something that is compulsory in most States, is not the effect of prohibiting school prayer an affirmative hostility toward religion?

Ms. MEREL. The view of the association is no. As has been pointed out earlier, our public school system already greatly accommodates the practice of religion in this country by permitting students and their parents to choose attendance parochial at schools in lieu of public schools.

Therefore, those people who feel that the public schools do not meet their religious needs can completely substitute a religious education. The Supreme Court has also upheld release time programs which permit students to depart from school during regular hours and go outside of school buildings, off school grounds, in order to get religious education.

Our great concern is, once again, that we do not feel comfortable with government or governmental entities, such as schools giving the appearance of in any way endorsing any views about religion.

With respect to the discussions that have taken place here about whether students can hold religious activities after school on school grounds, the Supreme Court has decided to permit such activity on the university level, where a university typically serves as a forum open to many different views, not just many different religious views, and provides access to its buildings to all sorts of other groups. We feel very comfortable with that decision. Our concern is, as has been repeatedly expressed, that elementary and even high school students are not as mature so are college students or Senators in terms of being able to maintain their own individuality and their own views.

We have concluded that, if a program could be devised on the lower level, for after school hours, with no appearance of official endorsement of religion or religious views, and if in such cases those schools were also open to all sorts of public community activities—religious, non-religious, quilting, whatever—on a voluntary, equal basis, then to allow religion into the schools in those after hour ways is not objectionable.

But when you bring religion into school during school hours students can have the perception that somehow religion is being endorsed by their teachers.

Senator **HATCH**. But then what you are saying is that you would agree with overturning the *Lubbock* decision?

Ms. **MEREL**. I said if it was voluntary activity——

Senator **HATCH**. After school hours.

Ms. **MEREL** [continuing]. After school——

Senator **HATCH**. Well, let us assume——

Ms. **MEREL** [continuing]. In a situation where the school opened itself, opened its doors to all sorts of activities——

Senator **HATCH** [continuing]. Everybody else.

Ms. **MEREL** [continuing]. So that there would be no connection between the school authorities and religion, just as you may have social dances or other groups coming in to the schools in the evening. We think some of the concerns rasied by the *Lubbock* case are important. For example, is religious activity to occur immediately before or immediately after school hours? Are students going to be arriving and seeing such activity, as opposed to its taking place after hours and outside of school?

Senator **HATCH**. But what you describe is exactly the *Lubbock* situation. So you would overrule it.

Ms. **MEREL**. No. We would not.

Senator **HATCH**. You would not overrule *Lubbock*.

Ms. **MEREL**. No, because we felt, from reading the facts of the case, that there was an imprimatur of governmental or school favoritism toward religion in this——

Senator **HATCH**. In a hi-fi club? Or Hi-Y club? What was it a Hi-Y.

Mr. **FREITAG**. Hi-Y. Better try Hi-Y rather than hi-fi.

Ms. **MEREL**. I am sorry. In a Hi-Y club?

Senator **HATCH**. I think it was the Hi-Y club involved there.

Ms. **MEREL**. Although I do not remember the name of the organization, we have read the case. There was a history in that school of the school's endorsing prayer in all sorts of ways. We are concerned—and this goes to the whole question of silent prayer or meditation as well—whenever there appears to be a governmental purpose that is not secular. When it seems that a governmental activity has a religious purpose, however labeled, and whether called voluntary or whether said to be on an equal-time basis, if it in fact has the purpose of encouraging prayer, we are opposed to it.

Senator **HATCH**. Well, quite apart from the promotion of religion, do you see any merits to the suggestion that restoration of school prayers is a means of emphasizing such secular concepts as tolerance, morality, good citizenship, and so forth?

I think we would all agree those are secular concepts, are they not?

Ms. **Merel**. Yes; but the difficulty is that, if you use religion to achieve secular purposes, then the question arises: Whose religion or what kind of prayer do you use?

Senator **Hatch**. I see. Well, you say in your statement--and I will make this the last question--even if Senate Joint Resolution 73 were revised to protect only silent forms of prayer and meditation which clearly the administration's proposal does not do, your objections would not be satisfied.

Government would still be engaging in religious as distinguished from secular activity. And it would still be elevating certain beliefs about religious things over others. Religious beliefs favoring public and silent prayer would be elevated over those advocating other forms of religious expression, just as religious belief would be elevated over atheism, agnosticism, or other forms of skepticism.

What is wrong with that? I personally think it ought to be elevated above agnosticism, atheism, and other forms of skepticism. I also recognize that anybody has a right to think any way he wants to.

Ms. **Merel**. The view of the association is that government should not be taking a view about religious things. A view opposed to atheism, as well as a view in favor of one particular religion or another—each should be kept out of politics and out of the political community to avoid the kind of controversy and discord that——

Senator **Hatch**. Some say——

Ms. **Merel**. Excuse me?

Senator **Hatch**. Some say that merely by having the Government disallow all religious expression in the public schools that they really are taking a position, a position against religion and in favor of irreligion or at least neutrality toward irreligion.

I have been interested in the disparity between certain Baptist conventions and other religions as well. In that regard, I would put into the record at this point the statement of the administrative board of the U.S. Catholic Conference concerning a constitutional amendment to permit religious instruction and prayer in public schools and other public institutions. It is dated September 13, 1973. And in particular, one paragraph.

> The U.S. Catholic Conference believes an amendment limited to allowing prayer would be inadequate to meet the national need. The amendment which is needed must cover prayer and religious instruction.

So they would like to go farther than most here. And I might add, this has been reaffirmed last year.

Now, for those who may be watching this hearing, I hope that Baptists will write to Mr. Dunn and to Reverend Dugan and let them know where they really do stand. And write to this committee as well so that we have a better understanding, because if the polls are right, 80 percent of the people would like to have some form of prayer, in the public schools.

In any event, I would like to know, and I would like to hear from them. And I certainly would like both of you gentlemen to hear from them as well so that we can all benefit from that particular information. They might distinguish as they write in whether or not they object as others do to an oral prayer that might be set by the State or local government, or whether they would object to a form of silent prayer or meditation that——

Mr. DUNN. Could I say something?

Senator HATCH [continuing]. With no obligation to participate. Yes?

Mr. DUNN. These resolutions passed by these conventions were typically in opposition to the prayer amendment proposed.

Senator HATCH. I see, to this amendment.

Mr. DUNN. To this amendment.

Senator HATCH. So they may like silent prayer.

Mr. DUNN. They may tolerate some equal access approach in which I think there may be merit with enough qualifications.

Senator HATCH. Well, that is good.

Mr. DUNN. I think they might tolerate some understanding of a moment for silence.

Senator HATCH. OK.

Mr. DUNN. And I think there is a good deal of evidence that they would. And I think a lot of the people who responded in that 80 percent who were for school prayer also do not necessarily mean by saying that they are for school prayer that they favor this particular amendment.

Senator HATCH. OK. I think that has been helpful. And what this committee wants to do it to get the best perspectives we can from all sides of this issue, and frankly, the testimony of Mr. Freitag and Ms. Merel has been very helpful because we want to consider all of the thoughts and objections that they have, and other witnesses as well.

So, with that, we will recess these hearings until further notice.

[Whereupon, at 1:43 p.m., the subcommittee was adjourned, subject to the call of the Chair.]

VOLUNTARY SCHOOL PRAYER CONSTITUTIONAL AMENDMENT

MONDAY, JUNE 27, 1983

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee convened, pursuant to notice, at 9:34 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Strom Thurmond, chairman, presiding.

Present: Senators Metzenbaum, Hatch, Leahy, and DeConcini.

Staff Present: Richard Bowman, general counsel; Stephen Markman, chief counsel (Subcommittee on Constitution); Ben Scotch (Senator Leahy's staff); Phil Barker, professional staff member; and Sharon Peck, chief clerk.

OPENING STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA, CHAIRMAN, COMMITTEE ON THE JUDICIARY

The CHAIRMAN. The committee will come to order.

On March the 24, 1983, I introduced Senate Joint Resolution 73, a proposed constitutional amendment, stating that no provision or amendment of that document should be construed to block voluntary prayer in public schools or other public institutions. I introduced that resolution at the request of President Reagan.

On June the 9, 1983, this measure was ordered favorably reported by the Subcommittee on the Constitution. An alternative was also ordered reported at that time. That alternative, an original subcommittee proposal, was cosponsored by myself, subcommittee Chairman Orrin Hatch and Senator Charles Grassley. And I want to say now at this time that I personally favor the President's recommendation. However, this is an alternative that I think would be next in order in the event that the committee does not go for the President's recommendation.

At the close of the June 9 subcommittee meeting, I pledged as chairman of this committee to expedite these measures at the full committee level in order that we might be able to bring this important issue to the floor of the Senate with as little delay as possible. Subsequently, a hearing on the original subcommittee alternative proposal was requested because there had been no previous hearing on the language of that particular proposed amendment.

This morning, we will receive testimony concerning the concept of voluntary silent prayer as set forth in the original subcommittee alternative constitutional amendment, or from others who wish to advocate the President's position who are on the agenda. In essence, that proposal would limit voluntary prayer to silent prayer or meditation and restrict such activity to public school facilities only. It would also prohibit the Federal and State governments from encouraging or promoting any particular form of prayer or medication. A new provision not contained in Senate Joint Resolution 73 would allow all voluntary student groups to have access to public school facilities on an equal basis.

Since I first introduced the school prayer amendment, several objections have been raised to its passage. While various reasons are generally given as the basis for failure to support Senate Joint Resolution 73, the objection most often voiced concerns the authorship of prayers by Government authorities. I believe that the prohibition in the original subcommittee proposal against the State and Federal Government fostering or promoting any particular form of prayer sufficiently addresses this concern. In a similar vein, I hope that we can derive from this hearing a consensus on the wording of an amendment which will pave the way to the reintroduction of voluntary prayer into our system of public schools.

Senator Hatch of Utah, do you have an opening statement?

Senator HATCH. I think Senator Metzenbaum has a statement, too.

Senator METZENBAUM. What time are we going to the floor?

Senator HATCH. Not until about 10, 10:10.

Senator METZENBAUM. Well, then, I really do not want to yield my time, because I want to be on the floor.

The CHAIRMAN. The distinguished Senator from Ohio, then.

OPENING STATEMENT OF HON. HOWARD M. METZENBAUM, A U.S. SENATOR FROM THE STATE OF OHIO

Senator METZENBAUM. I apologize to my friend from Utah, but I think we both want to be on the floor. I think it is unfortunate that, with 13 million Americans unemployed this morning, the most important matters before the U.S. Senate have to do with the subjects of abortion and prayer in the schools. That is a rather sad commentary as far as this Senator is concerned, because I believe that the issue that we have before us today, which everyone would consider to be a high moral issue, has about it a kind of immorality. The immorality that I see is the effort to find a way to change the Constitution with respect to one of the most basic tenets upon which this Nation was founded. The Nation was founded on the concept that people could come here to this country and that there would be a separation of church and State. And now, through all sorts of jingoistic phraseology, and all sorts of high moral precepts—allegedly high moral precepts—we are being urged to say to little children in schools that they may in some way be involved with prayer in the schools.

I do not yield to any person in the U.S. Congress as far as my concern for morality and for the teaching of our children. But the facts are that I believe there is a higher principle involved, a higher concern, and that is that many nations of this world have found themselves in a very difficult position by reason of the joining of church and State. What the constitutional prohibition refers to is the fact that each shall be totally separate. It is very specific. "Congress shall make no law respecting establishment of religion or prohibiting the free exercise thereof." The real question that then comes about, no matter how you draft this language, is: "will little children be called upon at some point to pray in school, whatever their religious beliefs may be?" How about the little child who does not want to pray? That child also has a right in this country. There is no obligation for anyone to have a particular religion. I have mine; each of these distinguished Senators next to me has his. But if a child has no religion, that child also has constitutional rights, and also a right of individual liberty.

So I believe that this effort on the part of the administration and on the part of some of my colleagues to find a way to draft language to change the Constitution of the United States so that prayer may be a part of the school operation, regardless of how you fence it in, to me, violates not only the Constitution, but also violates the original precepts upon which this great Nation of ours was founded.

There are many people who say that this Nation has become as great as it is because of the free enterprise system, the capitalist system, and others say that it is as great as it is because we have a system—I heard it testified to the other day—under which you can patent your inventions. I, for one, believe that it is as great as it is because we have a Constitution, the provisions of which provide for this total separation of church and State.

Therefore, I think that as we play with the words, and as we attempt to figure out some particular language, we may be following the politically popular route. In the long run, however, we are doing violence to the highest principles and precepts of this Nation of ours. And I, for one, intend to do everything within my power to see to it that we not change the Constitution and that those who want to pray shall have the right to pray in their own homes, in their own churches, but not in our schools, and I think that I, in this instance, am on the moral side of the whole issue.

Thank you, Mr. Chairman.

The **Chairman**. The distinguished Senator from Utah.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator **Hatch**. This marks the seventh day of hearings by the Senate Committee on the Judiciary over the past year on the subject of proposed amendments to the Constitution relating to school prayer.

Today's hearing follows a decision by the Subcommittee on the Constitution to report to the full committee two proposed amendments on this matter, Senate Joint Resolution 73, proposed by the administration, and Senate Joint Resolution "blank," a new proposal emerging from the subcommittee.

I would like to focus briefly upon this latter proposal, sponsored by Chairman Thurmond, Senator Grassley, and myself. What this proposal would do is to allow States and localities to permit individual or group silent prayer or meditation at the outset of the public school day. In addition, it would clarify that there is no constitutional impediment to local school districts allowing voluntary, extracurricular student organizations of a religious character from using public school facilities on the same basis as similar organizations of a nonreligious character. This relates to the so-called equal access issue.

Because the constitutional amendment I am talking about represents an effort to achieve a consensus approach on an extremely difficult issue, it has been the subject of criticism by a number of sincere individuals and organizations on both ends of the political spectrum who would prefer different approaches. I respect their judgment, but would like, nevertheless, to offer a number of comments about their criticisms.

To those of a more liberal persuasion who are critical of the proposed alternative amendment, let me emphasize several important points.

First, the amendment would only permit individual or group silent prayer or meditation. It would not permit the expression of denominational prayer, or of any other oral or vocal prayer.

Second, the amendment would not establish any constitutional right in any individual to require prayer in the schools. It would simply leave this decision with the State and local community. No State or local community would be compelled to allow prayer.

Third, the proposed amendment would not require any individual to participate in silent prayer or meditation. Reasonable accommodations would have to be made for individuals who chose, for any reason, not to participate in silent prayer or meditation.

Fourth, the proposed amendment would prohibit any form of overt or subtle encouragement of any particular form of prayer. Neither the State nor the local community nor the classroom teacher could in any way encourage the silent expression of any form of prayer.

Fifth, there would be absolutely no role under this amendment for the State or any other public authority to draft any prayer, compose any prayer, or select any prayer for students. Because only silent expressions of prayer would be permissible, the State would have no responsibility in this regard.

Finally, pressures upon the minority religion student would be absolutely minimized by the proposed amendment. Because it relates to silent prayer, each student would be able to utter those thoughts most meaningful to him or her. Although they would be free to excuse themselves from even the silent period, there would be virtually no need for any minority religion student to have to excuse himself from a classroom in a conspicuous manner or to embarrass himself or herself among his or her peers in any way.

In short, Mr. Chairman, the proposed alternative amendment fully respects the values of religious tolerance that underlie our Constitution, as well as its direction against fostering unnecessary entanglements between church and State.

To those of a more conservative persuasion who have been critical of the proposed amendment, let me emphasize several additional points.

First, simply because a prayer is silent rather than vocal does not mean that it is a weak prayer. Indeed, I am concerned that any State-approved prayer, once it has gone through the necessary committees and legislative bodies, is likely to be so weak that it will be meaningless to virtually all individual students. The value of silent prayer is that each child can pray in as intense a manner as he or she desires. Every child can be accommodated, with the most robust expressions of personal devotion.

Second, I would argue that it would be a great achievement for this country if we were able to reaffirm through the proposed amendment that the historic understanding of the "establishment clause" has identified a proper, supportive role between the State and expressions of religious value. The proposed amendment would end the regime by which there is a little-disguised policy of official antagonism between church and State.

Third, I would argue that it would be a great achievement for this country to reaffirm that a student's education ought properly to consist of the development of spiritual character. This would reverse the decades long trend by which public schools arrogate to themselves more and more teaching and social functions, while doing less and less to inculcate some sense of personal reflection and introspection.

Finally, I believe that the equal access provisions of the pending amendment would also serve to clarify that there are two religion clauses in the first amendment—the "establishment" clause and the "free exercise" clause. Section 2 of the proposed amendment would strongly emphasize that the Constitution protects religious speech in the same manner that it protects other forms of "free speech."

Mr. Chairman, I believe that the proposed subcommittee amendment would establish a public policy endorsed by a substantial majority of the American people of all political persuasions and walks of life. It is consistent with the constitutional values that have been at the foundation of this country since its inception. I would respectfully ask my friends on both sides of the political spectrum to reconsider their objections, look carefully at alternative solutions, and join in the support of the proposed amendment.

[Whereupon, Senator Hatch assumed the Chair.]

Senator **Hatch**. Senator DeConcini, we will turn to you at this time.

OPENING STATEMENT OF HON. DENNIS DeCONCINI, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator **DeConcini**. Thank you, Mr. Chairman.

I am pleased that we are holding an additional day of hearings on the proposed amendment before us. Although this committee held extensive hearings earlier on the issue of school prayer, what has evolved to be considered before us today, I do not believe there have ever been any hearings on.

Today's hearing should eliminate any perception that there have not been full and fair hearings on this matter, and I commend the chairman for his actions in holding these additional hearings.

From time to time in its history, the Supreme Court has made decisions so unacceptable to the public that they were overruled by constitutional amendment. The *Dred Scott* case, holding that slavery could not be prohibited in the new territories, was set aside by the post-Civil War amendments. After the Supreme Court found the Federal income tax unconstitutional in 1893, the 16th amendment was passed to authorize such a tax.

Thus, when the Supreme Court ruled in 1962 that reading of prayer aloud in public classrooms was an "establishment of a religion" forbidden by the first amendment, there were sparks, similar to the other outcries, for reversal; decisions such as *Engel* v. *Vitale* and *Abington* v. *Schempp,* as well as others not relating directly to school prayer. The Supreme Court has established a theory of the first amendment that is contrary to the intent of the founders, the historical development of the first amendment, the spirit of our Constitution.

The Supreme Court has held the school system to be constitutionally forbidden from sponsoring devotional exercise such as prayer or bible-reading in the public schools; forbidden from permitting private teachers of religion to give religious instruction to students during the school day; forbidden from adapting the school curriculum to reflect religious beliefs, and forbidden from posting such religious affirmations such as the Ten Commandments on the classroom wall, regardless of whether the students participation was voluntary or not. This in a Nation where the evidence that we are a religious people surrounds us every day—in our coins, our national anthem, our pledge of allegiance. Our faith in God, expressed through prayer, is richly engrained in the American history.

The purpose of the first amendment "establishment" clause was not to erect a wall of separation between the State and religious expression. Its purpose was to present the establishment of a preferred religion. However, in an attempt to conform to the severe constraints of court-imposed separation, our public schools do not even acknowledge the existence of God. This environment is most unfortunate, in my opinion.

I do not see what alternative Congress now has in restoring the traditional understandings of the first amendment establishment clause, short of a constitutional amendment adopted through the proper, article V route. Such an amendment has the overwhelming support of the American people.

The amendment being considered today steers a wise course. It does not mandate prayer in public schools, but simply seeks to remove any constitutional barrier to voluntary prayer. This amendment would permit schools to accommodate, in the best manner, the free exercise of religion. What else could this country want but just that—a period of silence where no one is forced to do anything they do not want to, and yet, one can express themselves if they so feel.

Supreme Court rulings have been blamed for the deteriorating quality of public education, for the breakdown of the American family, for the decay in moral principles, and the abdiction of government institutions to secular humanism. I do not side with those who seek prayer in school as a panacea for all of these ills and problems. I do, however, believe that we are a religious and moral people and that religious expression has an important place in our lives.

While I believe in the role of prayer in our children's schools, I have concerns which I hope to see addressed at these hearings. I am concerned that any amendment approved by this Congress ensures that voluntary religious expression is protected. I am also concerned about how the content of group prayer suggested in the President's amendment might be determined.

Finally, I will look to see if the amendment is consistent with the cherished constitutional beliefs of toleration of diverse religions, protection of the rights of minorities, and maintenance of the difference between church and State.

Most importantly, I seek accommodation of the diverse attitudes toward religious expression in these public hearings.

Thank you.

Senator **Hatch**. Thank you, Senator DeConcini. We appreciate your remarks.

Our first witness today will be the Hon. Edward Schmults, who is the Deputy Attorney General of the United States, and who has represented the administration on two previous occasions before this committee on the President's proposed constitutional amendment on the subject of school prayer.

Mr. Schmults, I am going to have to apologize to you. I have to be on the floor in approximately 10 or 15 minutes, but I am going to listen to as much of your testimony as I can. And I apologize to other witnesses. There are a number of friends, who are testifying today, on both sides of this issue, whom I admire a great deal.

I notice that Senator Mark Hatfield has arrived.

Mr. Schmults, would you mind if I allowed Senator Hatfield to go first, in order to accommodate his time constraints?

Mr. **Schmults**. Please go ahead.

Senator **Hatch**. Mark, we are happy to welcome you before the committee. We know that you feel deeply on these issues. We will be most interested in what you have to say.

STATEMENT OF HON. MARK O. HATFIELD, A U.S. SENATOR FROM THE STATE OF OREGON

Senator **Hatfield**. Thank you, Mr. Chairman, and I want to thank Mr. Schmults for his courtesy in permitting me to lead off here this morning.

Mr. Chairman, I have a statement with some documents that I would ask your support in entering into the record.

Senator **Hatch**. Without objection, they will be entered into the record as though delivered.

Senator **Hatfield**. Thank you.

Let me just briefly summarize, if I could, to expedite the hearing as much as possible for you. This is a very busy day on which you are going to be on the floor for most of the day.

Mr. Chairman, I would like to just read the first amendment to the Constitution.

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof"—I repeat, "or prohibiting the free exercise thereof"—"or abridging the freedom of speech or of the press, or of the right of the people peaceably to assemble and to petition the government for redress of grievances."

Mr. Chairman, I submit that the present ruling of many of the Federal courts of this country today deny the first amendment rights of students in secondary education. I say that because in effect, in a number of cases—at Guilderland High School, a New York case, and the *Lubbock, TX,* case, two of the more better known cases—they very clearly deny the first amendment speech rights of students of those high schools who would voluntarily associate themselves together in matters discussing religion, or studying the scriptures, or praying, or whatever they might want to do, in noninstructional periods.

Now, when a school has set forth a forum by which students may voluntarily associate themselves, to establish a camera club, a music club, an athletic club, or a philosophy club—a philosophy club that could discuss the philosophies of Karl Marx or Hegel, or any of the other, well-known philosophers—but once they have crossed that boundary and begin to study the great philosophy of an Isaiah or a Jesus Christ, then, that becomes illegal.

Now, I submit under the freedom of speech, under the freedom to assemble, under the freedom to exercise their religious speech rights, the courts are in violation of the Constitution.

Now, I must confess to you that I do not support the prayer amendment to the schools that would put prayer into the schools in one form or another. I happen to have a very strong Baptist background, and I believe in the strict separation of church and state. But that is not the issue here. The issue is simply the denial of the religious rights of our citizens when they are at the secondary education level.

Second, these Federal appellate decisions force the schools to be hostile to religion. Now, I think the Government is to be neutral in matters of religion. I think that has been established over the years. But this is not neutrality. This is a hostile role, when they deny the students this right to voluntarily associate themselves.

Now, I think it is very interesting to note that the same question was raised in a case involving public universities. Here again, the University of Missouri permitted students to organize into various associations voluntarily, so long as they did not intrude into instructional time periods. Once again, students were denied the right to organize and meet for religious purposes.

The Supreme Court held in the *Widmar* case, 454 U.S. 263, in 1981, that once a public university established an open forum, they could not dictate the content of the forum, they could not censor the forum, and they could not abridge the freedom of religious speech in that forum.

I believe that the Supreme Court was correct in the *Widmar* case, and all I am suggesting in the bill that I have introduced, S. 815, is to apply that same wisdom of the Supreme Court to secondary institutions of learning.

That is in a nutshell what we are attempting to do here. I am delighted to say that there has been a more recent Federal court ruling that has applied that doctrine of the *Widmar* case to public secondary schools. As you know, because you joined along with about 23 other Senators last year, I submitted an amicus brief to the Supreme Court, asking them to issue a writ of certiorari, to take on the *Lubbock* case and to review it. Unfortunately, the

Court denied that request. So we are back now to try to resolve this matter in the legislative process, to once again establish the rights under the Constitution and under the first amendment of students attending our public high schools.

Again, let me emphasize, I know there is a lot of confusion, but this is not a matter of requiring school prayer; this is not a matter of providing for a time for school prayer under the auspices of school districts or school boards. This is simply a matter of the first amendment rights of those students being guaranteed by the legislation which I have introduced.

In this material that I have submitted for the record, I have included a very excellent statement by Professor Tribe of Harvard Law School who has indicated support for this approach to guarantee the first amendment rights of secondary school students.

Mr. Chairman, that briefly is the crux of the bill that I have introduced. It is a rights bill, a civil rights bill. As a civil libertarian, I am deeply concerned about this right being denied, and therefore, I hope that we can have positive action on the part of this committee.

[The following was received for the record:]

PREPARED STATEMENT OF SENATOR MARK O. HATFIELD

MR. CHAIRMAN:

FIRST, I WANT TO COMMEND THE CHAIRMAN OF THIS COMMITTEE, SENATOR THURMOND, AND SENATOR HATCH FOR HOLDING EXHAUSTIVE HEARINGS ON THE PRESIDENT'S SCHOOL PRAYER AMENDMENT. I APPRECIATE THEIR SENSITIVITY IN SCHEDULING ANOTHER DAY OF HEARINGS AFTER THE CONSTITUTION SUBCOMMITTEE RECENTLY APPROVED AN ALTERNATIVE SCHOOL PRAYER AMENDMENT. IT IS ESPECIALLY ENCOURAGING TO NOTE THE ENDORSEMENT OF THE EQUAL ACCESS PRINCIPLE FOR STUDENT-INITIATED RELIGIOUS MEETINGS BY THE CONSTITUTION SUBCOMMITTEE.

MY COMMENTS TODAY ARE DIRECTED TOWARDS THE TASK OF DESIGNING AN APPROPRIATE REMEDY FOR STUDENTS WHO WISH TO USE SCHOOL FACILITIES ON AN EQUAL BASIS WITH OTHER STUDENT GROUPS. LAST FALL, I TESTIFIED BEFORE THIS COMMITTEE AND ARGUED THAT THE FIRST AMENDMENT TO THE U.S. CONSTITUTION SETS LIMITS ON THE ABILITY OF GOVERNMENT TO PROMOTE, ESTABLISH, AND INCULCATE RELIGIOUS BELIEFS IN PUBLIC SCHOOL STUDENTS -- BUT IT SETS NO LIMIT ON STUDENT-INITIATED PRAYER OR RELIGIOUS DISCUSSION DURING NON-INSTRUCTIONAL TIME PERIODS. INSTEAD OF CONCENTRATING UPON A SCHOOL PRAYER AMENDMENT, I URGED MY COLLEAGUES TO DEVOTE THEIR ENERGIES TO ROOTING OUT RIDICULOUS BARRIERS THAT HAVE BEEN ERECTED TO FORBID VOLUNTARY MEETINGS OF STUDENTS WHO SEEK TO MEET AND PRAY IN NON-DISRUPTIVE WAYS.

A GROWING NUMBER OF FEDERAL COURTS, HOWEVER, HAVE EXPANDED THE PROHIBITIONS ON THE SPONSORSHIP BY THE STATE OF RELIGIOUS ACTIVITY IN PUBLIC SCHOOLS TO ENCOMPASS EQUAL ACCESS POLICIES ADOPTED BY SCHOOL BOARDS AS WELL AS STUDENT REQUESTS TO MEET ON THEIR OWN TIME BEFORE OR AFTER SCHOOL HOURS FOR PRAYER, DEVOTIONAL READING OR RELIGIOUS DISCUSSIONS. THESE PROHIBITIONS ARE HOSTILE TO THE RIGHTS OF RELIGIOUS EXPRESSION AND, IN MY VIEW, VIOLATE THE FREE SPEECH RIGHTS OF STUDENTS.

IN THE LUBBOCK CASE, 23 SENATORS JOINED WITH ME IN FILING A FRIEND OF THE COURT BRIEF ASKING THE SUPREME COURT TO GRANT A HEARING AND REVERSE THE DECISION. IN THAT BRIEF, WE ARGUED THAT:

> "NEITHER LEGISLATION NOR A CONSTITUTIONAL AMENDMENT IS REQUIRED TO PERMIT A SCHOOL TO OPEN ITS FACILITIES FOR ALL APPROPRIATE STUDENT-INITIATED AND STUDENT-MANAGED ACTIVITIES INCLUDING, IF THE STUDENTS WISH, RELIGIOUS ACTIVITIES. THE CONSTITUTION ALREADY SO PROVIDES. THE ESTABLISHMENT, FREE EXERCISE AND FREE SPEECH CLAUSES OF THE FIRST AMENDMENT REQUIRE TREATMENT OF SUCH ACTIVITIES IN A NEUTRAL MANNER. CONSEQUENTLY, PUBLIC SCHOOLS PROPERLY MAY ALLOW STUDENTS EQUAL ACCESS TO SCHOOL FACILITIES FOR VOLUNTARY, EXTRA-CURRICULAR, RELIGIOUS SPEECH AND ASSEMBLY."

UNFORTUNATELY, HOWEVER, THE SUPREME COURT ON JANUARY 17, 1983, FAILED TO GRANT A WRIT OF CERTIORARI TO THE LUBBOCK SCHOOL BOARD. IT WAS MY HOPE THAT THE SUPREME COURT WOULD SEIZE THE OPPORTUNITY AT THE URGING OF 24 SENATORS TO GIVE GUIDANCE TO 90,000 PUBLIC SCHOOLS ON WHAT THE LAW SHOULD BE REGARDING THE USE OF SCHOOL FACILITIES DURING NON-CLASSROOM TIME PERIODS BY STUDENT-INITIATED

RELIGIOUS GROUPS. IT NOW BECOMES IMPERATIVE THAT THE CONGRESS GIVE GUIDANCE TO SCHOOL DISTRICTS RECEIVING FEDERAL FUNDS THAT RELIGIOUS SPEECH IS NOT TO BE GIVEN SECOND-CLASS TREATMENT.

OVER 20 SENATORS HAVE JOINED TOGETHER IN OFFERING S. 815 WHICH WOULD MAKE CLEAR THAT SECONDARY SCHOOL STUDENTS HAVE THE RIGHT TO MEET VOLUNTARILY DURING NON-INSTRUCTIONAL TIME PERIODS FOR PRAYER OR DEVOTIONAL READING. S. 815 HAS UNITED A NUMBER OF SENATORS WHO DIFFER ON CONSTITUTIONAL AMENDMENTS THAT PERMIT SCHOOL-SPONSORED PRAYER OR STATUTORY APPROACHES WHICH DENY JURISDICTION TO FEDERAL COURTS TO DECIDE SCHOOL PRAYER CASES. BUT THE SPONSORS OF S. 815 AGREE THAT THE CONSTITUTION DOES NOT ALLOW OUR PUBLIC SCHOOLS TO BE HOSTILE TO RELIGION.

MOST RECENTLY, IN BENDER V. WILLIAMSPORT AREA SCHOOLS, THE U.S. DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA HELD THAT A STUDENT-INITIATED RELIGIOUS GROUP HAD THE RIGHT TO MEET DURING A SCHOOL ACTIVITY PERIOD UNDER THE CONSTITUTION'S PROTECTION OF FREEDOM OF SPEECH. ALTHOUGH THIS CASE MAY BE THE BEGINNING OF A CHANGE IN DIRECTION BY OUR FEDERAL COURTS, EXISTING FEDERAL APPELLATE PRECEDENTS CONTINUE TO REQUIRE SCHOOL DISTRICTS IN AT LEAST TWO CIRCUITS TO RULE AGAINST STUDENT-INITIATED RELIGIOUS MEETINGS.

Testimony on April 28, 1983, before Senator Denton and the Senate Judiciary Committee established the fact that there are many instances across the nation in which students meeting quietly outside of classroom hours for religious discussion were required to discontinue their meetings because of uncertainty and apprehension about lower court decisions and possible litigation. These federal court decisions have had a chilling effect which has resulted in confusion, inconsistency and arbitrariness in attempting to comply with the Constitution's protection against the establishment of religion.

Distinguished constitutional law experts, such as Professor Laurence Tribe of the Harvard Law School, have concluded that S. 815 is "both constitutionally sound and wise as a matter of policy." President Reagan has urged this Committee to approve equal access legislation. Given the strong bipartisan support that this bill has received in the Senate, I urge the Committee to place equal access legislation on its calendar for action this summer.

I ask that Professor Tribe's letter, as well as other accompanying materials, be placed in the Record at the conclusion of my statement.

HARVARD UNIVERSITY
LAW SCHOOL

LAURENCE H. TRIBE
Tyler Professor of Constitutional Law

GRISWOLD HALL 307
CAMBRIDGE, MASSACHUSETTS 02138
(617) 495-4621

APR 25

April 11, 1983

The Honorable Orrin G. Hatch
United States Senate
Suite 135 Russell Office Building
Washington, D.C. 20510

Dear Senator Hatch:

I am writing to express my views about S.815, the Religious Speech Protection Act of 1983. I am sorry that my schedule does not permit me to testify in person in favor of the bill on April 28-29. I trust that this brief written expression of my judgment about the bill can be entered into the record in lieu of my personal appearance.

I believe that S.815 is both constitutionally sound and wise as a matter of policy. In §14-6 of my treatise, American Constitutional Law (1978), I advance an argument about the special importance of accommodating religious freedom even where some might argue that doing so raises problems under the Establishment Clause. The Supreme Court's opinion in Widmar v. Vincent, 454 U.S. 263, 272 n.11 (1981), cited that portion of my treatise in support of its conclusion that a state university that makes its facilities generally available for the activities of student groups does not violate the Establishment Clause when it permits such groups to use University buildings for purposes of religious worship or teaching but, on the contrary, violates the Free Speech Clause when it discriminates against a meeting of students on the basis of the religious speech or worship that will take place at such a meeting.

Notwithstanding the additional problems that might arise when religious meetings are conducted on the campus of a public secondary school, I believe that the same conclusion should follow in that context, provided only that the student meetings at issue are not state-initiated, school-sponsored, or teacher-led in any way that might lead to direct or indirect coercion of any student. The Supreme Court's failure to address this issue subsequent to Widmar v. Vincent should not be confused with a contrary view on the part of the Court.

I believe that S.815 properly reflects this constitutional position. It would prevent public secondary schools that receive federal aid from discriminating against any student meeting during non-instructional periods "on the basis of the religious content of the speech at such meeting" so long as the meeting is voluntary and otherwise lawful. The Constitution, in my view, requires as much; surely it is appropriate for Congress to insist that schools receiving funds from the Federal Treasury comply with the First Amendment. Moreover, S.815 carefully provides that nothing therein may be construed to permit any level of government either to "influence the form or content of any prayer or other religious activity," or to "require any person to participate in prayer or other religious activity." This provision guarantees that, should "voluntary" prayer be organized in such a way as to make nonparticipants feel ostracized or otherwise suffer by virtue of their abstention, their rights -- and those of their parents -- to judicial relief against the practice under the Free Exercise Clause would be unaffected by passage of this bill. Thus, no legitimate objection to S.815 can be based on the values of pluralism and freedom. If this bill is to be opposed, it must be opposed solely on the ground that even voluntary prayer may not take place in our public schools -- a proposition that President Reagan has incorrectly attributed to the Supreme Court, but one that I believe no thoughtful student of the Constitution could possibly endorse.

For these reasons, I believe S.815 should be adopted.

Yours truly,

Laurence H Tribe

Laurence H. Tribe
Tyler Professor of Constitutional Law

LHT:jw
cc: The Honorable Jeremiah Denton
The Honorable Mark O. Hatfield
The Honorable Edward M. Kennedy

MARK O. HATFIELD
OREGON

United States Senate
WASHINGTON, D.C.

June 9, 1983

Dear Colleague:

A number of us, with divergent views about S.J. Res. 73, the proposed constitutional amendment concerning prayer in public schools, have found common agreement relating to an area of great confusion and misunderstanding among secondary school administrators and faculty, as well as among students and parents. We agree with the principles of the U.S. Supreme Court decision in Widmar v. Vincent, 454 U.S. 263 (1981), that where various student groups are allowed to meet on their own initiative during non-instructional time periods, it is wrong to censor their speech to prohibit prayer or religious discussion.

Although Widmar arose in a public university, lower federal courts have refused to apply this principle to public high schools. Unfortunately, a growing number of federal court decisions have singled out student initiated meetings as violative of the First Amendment to the U.S. Constitution.

Let us cite just two examples:

1. At Guilderland High School in New York, Christian students sought and have been denied the right to meet before classes for prayer. The meetings were voluntary, required no school announcements or sponsorship. A federal district court and Appeals Court have upheld the school board's refusal to allow the group to meet. Brandon v. Guilderland Control School District, 635 F.2d. 971 (2d Cir. 1980), Cert. denied, 102 S.Ct. 970 (1981).
2. In Lubbock, Texas, the school board drafted a careful policy that accommodated student-initiated religious activity on an equal basis with other student groups in the use of school facilities for meetings before and after school. The United States Court of Appeals for the 5th Circuit struck down this school board policy and forced a total ban of voluntary, student-initiated religious activity. Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d. 1308 (5th Cir. 1982), Cert. denied, 51 U.S.L.W. 3533 (January 18, 1983).

Testimony on April 28, 1983, before the Senate Judiciary Committee established the fact that there are many instances across the nation in which groups of students meeting quietly outside of classroom hours for religious discussions were required to discontinue their meetings because of uncertainty and apprehension about lower court decisions and possible litigation. These federal court decisions have had a chilling effect which has resulted in confusion, inconsistency and arbitrariness in attempting to comply with the Constitution's protection against the establishment of religion.

On March 15, 1983, we introduced S. 815, which establishes a judicial remedy for high school students who are aggrieved by a discriminatory policy that is formulated and carried out by public schools which receive federal financial assistance. The bill is a straight forward attempt to apply the Widmar rule of equal access to lawful student groups in secondary schools.

As safeguards, the bill:

- would prohibit officials from influencing the form or content of any religious activity, or allowing any coercion of participation.
- protects the discretionary role of school administrators to allow non-disruptive student meetings on an equal access basis, or to refuse access to all student groups provided the policy is content-neutral.
- will not require opening the campus to outside groups since it is student-initiated meetings which have the equal right of access under the Widmar decision.

Distinguished constitutional law experts, including Professor Laurence Tribe of Harvard Law School, Dean Terrance Sandalow of the University of Michigan Law School, Professor Walter Dellinger of Duke University Law School, and others, have gone on record that the principle of Widmar, though it was expressed in a college-level case, appropriately applies to secondary schools.

Most recently, in Bender v. Williamsport Area Schools, the U.S. District Court for the Middle District of Pennsylvania, held that a student initiated religious group had the right to meet during a school activity period under the Constitution's protection of freedom of speech. Although this case may be the beginning of a change in direction by our federal courts, existing federal appellate precedents continue to require school districts in at least two circuits to rule against student-initiated religious meetings.

We ask that you join us in co-sponsoring S. 815. If you wish to join in this effort please contact me or Randy Sterns or Craig Higgins of my staff at 224-3753.

Sincerely,

Pete V Domenici

Bill Proxmire

Max Baucus

J Bennett Johnston

Jake Garn

Jim Abdnor

Al Simpson

Don Nickles

Jim Exon

Bob Kasten

Sam Nunn

Roger W Jepsen

Bill Roth

Dennis DeConcini

David Boren

Jennings Randolph

United States of America

Congressional Record

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Vol. 128 WASHINGTON, TUESDAY, DECEMBER 21, 1982 *No. 154—Part II*

Senate

•AMICI CURIAE BRIEF IN LUBBOCK CASE

● Mr. HATFIELD. Mr. President, on December 14, 1982, 24 Members of the U.S. Senate filed an amici curiae brief with the Supreme Court in Lubbock Civil Liberties Union against Lubbock Independent School District. The brief asks the Court to grant a hearing and reverse the decision.

The brief makes these basic arguments:

First there is confusion as to the proper policy for student initiated religious activities in public schools that merits Supreme Court review.

Second, the Lubbock decision violates the principle of neutrality and requires the State to become the adversary of students who wish to engage in religious speech.

Third, the Lubbock decision violates the free speech rights of students and discriminates against religious speech.

Mr. President, I wish to thank the Senators who joined me in this effort for thier contribution. I believe much of the confusion which has followed the Court's decision of the 1960's would be cleared up if the issue of student-initiated religious speech in public high schools is addressed by the Supreme Court.

Mr. President, I ask that the brief be printed in the RECORD.

The brief follows:

[In the Supreme Court of the United States, October Term, 1982—No. 82-805]

LUBBOCK INDEPENDENT SCHOOL DISTRICT, *et al., Petitioners,* VERSUS LUBBOCK CIVIL LIBERTIES UNION, *Respondent*

Brief Amici Curiae of Senator Mark O. Hatfield, Senator Paul Laxalt, Senator Jennings Randolph, Senator Jake Garn, Senator Pete V. Domenici, Senator Jeremiah Denton, Senator Donald L. Nickles, Senator Slade Gorton, Senator Jesse A. Helms, Senator S. I. Hayakawa, Senator James Abdnor, Senator David L. Boren, Senator Dennis DeConcini, Senator William Proxmire, Senator Alan K. Simpson, Senator Orrin G. Hatch, Senator Roger W. Jepsen, Senator Paula Hawkins, Senator William L. Armstrong, Senator Sam Nunn, Senator Robert J. Dole, Senator Max S. Baucus, Senator Howell Heflin, and Senator J. Bennett Johnston, Members of the U.S. Congress, in support of the Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit

INTEREST OF THE AMICI CURIAE

The amici curiae are elected members of the United States Senate. Each has taken an oath to support and defend the Constitution of the United States. Each serves at the will of and as the representative of the citizens of one of the several States. Each bears the responsibility of voting upon legislation designed to preserve and protect rights guaranteed by the Constitution of the United States.

Amici do not lightly seek leave to appear before this Court. However, the decision below would require a school board to discriminate against students who wish to use school facilities outside school hours for discussion the school board considers to have religious content. We submit that the decision violates fundamental principles of the First Amendment. The decision treats one of the most devisive social issues of our day. It is an issue involving the deepest convictions and most cherished liberties of the American people.

The issue presented is one that we have been asked to address officially on several recent occasions and one which we will have to address again. The United States Senate has before it constitutional amendments to permit prayer in public schools,[1] legislation to permit prayer in public schools to some degree,[2] and legislation to remove voluntary school prayer cases arising under state law from the jurisdiction of the federal courts.[3]

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[1] S.J Res. 199, 97th Cong., 2d Sess. (1982), a constitutional amendment proposed by President Ronald Reagan and sponsored by Senators Thurmond and Hatch declares that "Nothing in the Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer." An alternative constitutional amendment proposed by Senator Byrd is similar in nature. S.J Res. 247, 97th Cong., 2d Sess. (1982).

[2] Title IV of S. 1378, 97th Cong., 1st (1981) and S. 1577, 97th Cong., 1st Sess (1981), introduced by Senator Jepsen, would grant every individual the right to participate in voluntary prayer or religious meditation in any public building and would forbid the State from abridging that right. S. 2928, 97th

The proposals before the Senate are responsive to the widespread perception that the courts are interpreting the Constitution in a way that is hostile to religion. We are of the firm conviction that the decision below is just such a decision and that, if allowed to stand, it will place the judiciary at odds with the people it serves and the Constitution it interprets. The Constitution is not hostile to religion and the prior decisions of this Court do not compel the holding below that it is. Rather, the overwhelming weight of this Court's prior decisions establishes that the Constitution requires the government to maintain neutrality toward religion in a way that recognizes and protects the liberties of our students. The holding below improperly requires state hostility to religion and infringes student rights.

This case presents the Court with the opportunity to resolve an issue of unusual importance that is causing widespread confusion and confrontation. Numerous school boards throughout the country are uncertain as to the applicable law on the subject of equal access to school facilities by voluntary student groups.[4] Some, relying on this Court's recent decision in *Widmar* v. *Vincent*, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981), applicable to colleges, believe they must permit voluntary religious activities that are initiated and run by students when they take their facilities available for nonreligious activities Others, relying on the decision below,[5] believe they are prohibited from doing so. Still others believe that the discretion whether to permit such activities rests with the school boards. A clear rule on this issue is urgently needed. This case squarely presents the Court with the opportunity to announce such a rule.

Amici believe that neither legislation nor a constitutional amendment is required to permit a school to open its facilities for all appropriate student-initiated and student-managed activities including, if the students wish, religious activities. The Constitution already so provides. The Establishment, Free Exercise and Free Speech Clauses of the First Amendment require treatment of such activities in a neutral manner. Consequently, public schools properly may allow students equal access to school facilities for voluntary, extracurricular, religious speech and assembly.

Supreme Court reaffirmation of this neutrality principle will assist amici in acquitting their responsibilities as elected officials when acting upon pending legislation and constitutional amendments and when providing guidance to constituents who operate or attend public schools. These amici curiae have a substantial official interest in the issue presented in this case, and urge the court to grant the petition for certiorari and to reverse the decision of the Fifth Circuit.

STATEMENT OF THE CASE

On August 26, 1980, the Lubbock Independent School District adopted a policy concerning the use of school facilities during non-instructional periods that provided equal access to voluntary, supervised, student groups for any "educational, moral, religious or ethical purposes."[6] It is neutral on its face. Paragraph four of the policy states:

> "The School Board permits students to gather at the school with supervision either before or after regular school hours on the same basis as other groups as determined by the school administration to meet for any educational, moral, religious or ethical purposes so long as attendance at such meetings is voluntary."

The Lubbock Civil Liberties Union challenged this policy under the Establishment Clause of the First Amendment as unconstitutional on its face and as applied.[7]

The District Court held that the equal access policy was not facially unconstitutional. Rather, it "strikes the correct balance between the First Amendment's mandate against governmental establishment of a religion and its protection of the free exercise of religion."[8] The District Court also found that there was no evidence that the policy had been unconstitutionally applied.[9]

The Fifth Circuit Court of Appeals reversed this decison, finding that the School Board's equal-access-to-facilities policy was an unconstitutional establishment of religion. *Lubbock Civil Liberties Union* v. *Lubbock Independent School District*, 669 F.2d 1038 (5th Cir. 1982). The Circuit Court held that the policy was constitutionally objectionable because it "appear[ed] in the middle of a policy concerned with religious activities in the schools,"[10] because it authorized student meetings "at a time closely associated with the school day"[11] thereby demonstrating "implicit support and approval of the religious meetings,"[12] and because the School District, in connection with its statutory responsibilities concerning school property, intended to provide personnel to ensure the protection of school property during the student meetings.[13]

Cong., 2d Sess. (1982), introduced by Senator Hatfield, would require public secondary schools that receive federal aid and which generally allow students to meet during non-instructional periods also to permit use of school facilities on an equal basis by students meeting voluntarily for the purpose of religious discussion or prayer.

[3] S. 481, 97th Cong., 1st Sess. (1981), and S. 1742, 97th Cong., 1st Sess. (1981), introduced by Senator Helms, would eliminate Supreme Court and federal district court jurisdiction to review and hear any case arising under state law relating to voluntary prayer in public buildings and schools.

[4] *See, e.g.* 128 Cong. Rec. S11780-86 (daily ed. Sept. 17, 1982). The present confusion is discussed in more detail, *infra*, at 9.

[5] The Fifth Circuit decision, reported at 669 F.2d 1038 (5th Cir. 1982), is reprinted as Appendix A to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit filed November 12, 1982 ("Petition for Certiorari").

[6] Since this case clearly involves the question whether public school facilities already available to other student groups may be made available on an equal basis to voluntary student groups seeking to engage in religious discussion or prayer, it differs from *Brandon v. Board of Education*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981), as that case was presented to this Court.

At the time the decision was rendered in *Widmar v. Vincent*, *supra*, 102 S. Ct. 269, and thus at the time of the denial of *certiorari* in *Brandon*, the court described *Brandon* as a case "in which religious groups claim that the denial of facilities *not* available to other groups deprives them of their rights under the Free Exercise Clause." 102 S. Ct. at 276 n.13 (emphasis in original). The Court subsequently eliminated the reference to *Brandon* in footnote 13 of the *Widmar* decision, *see Widmar v. Vincent*, 454 U.S. 263, 273 n.13 (1981).

Rehearing *en banc* was denied, with four judges dissenting.[14] The dissenting judges asked: "Is neutrality still the objective or is it the fashion now to make the state the adversary of religious belief?" [15] This Court should resolve that question in favor of neutrality, by granting petitioner's writ, and by reversing the Fifth Circuit decision.

SUMMARY OF ARGUMENT

The question of whether a school board may open public school facilities to a broad range of student-initiated activities including religious activities or whether the school board must discriminate against activities it considers religious is one which the Supreme Court should resolve now. The Court left this question open in *Widmar* v. *Vincent, supra,* 454 U.S. at 274 n.14. The holding in Widmar and the neutrality principle it espouses point powerfully in one direction. The holding below points in the other. School boards do not know what the law is on a question of great importance to their communities. The Court should eliminate this confusion by announcing a clear equal access rule that can be applied by school authorities nationwide.

This case presents the issue clearly. The policy of the School Board is set forth in writing and has been struck down as unconstitutional on its face. Certiorari should be granted because the Fifth Circuit decision conflicts with the settled principle that neutral State policies concerning religion are not unconstitutional, and because the Fifth Circuit decision requires a deviation from such neutral policies that deprives students of their rights of Free Speech and Assembly.

ARGUMENT

Reasons for Granting the Writ

I. This Court should grant the writ to reduce the nationwide confusion concerning proper policies for religious activities in public schools

Many school boards across the country, genuinely wishing to comply with this Court's rulings, have struggled to resolve the issue of whether students may meet voluntarily for religious purposes. Some school authorities have concluded that such meetings cannot be permitted while others, interpreting the same conflicting legal precedents, have reached the opposite conclusion. For example:

In Sonoma, California, a group of high school students who had been meeting to discuss religious topics was recently disbanded by the school's principal after nearly ten years as a recognized student group. The school district's legal counsel, after reviewing this Court's decision in Widmar and the Fifth Circuit's decision in the instant case, advised the principal that Lubbock controlled in the high school setting and thus prohibited the group's activities.

In Anderson County, South Carolina, students have been meeting weekly in school facilities for the past two years before school buses arrived for prayer, Bible study and religious discussions. The students have met on school premises pursuant to a written policy applying to non-student groups allowing use of the school facilities "to promote the general cultural, civic, religious, educational and social welfare of the community." The policy was clarified in November 1982 to make explicit that religious activity is not permitted during the school day. The group may continue to meet under this policy. The local affiliate of the American Civil Liberties Union has threatened to sue the school board if the religious activities continue.

In Williamsport, Pennsylvania, high school students have sought recognition as a school club for prayer, Bible study, and discussion, and have asked permission to meet on the school premises during the early morning student activity period. Other student groups regularly meet during this activity period. The students' request has been denied based on the opinion of the school district's attorney that recognition of the group would violate the First Amendment. On June 2, 1982, the students filed a complaint against the school board in federal court seeking a declaration that the refusal to permit the students to meet violates their First Amendment rights.

In Saddleback, California, a written school policy permitted student groups to meet to discuss issues without regard to content and subject matter. The policy distinguished between sponsored clubs, which received financial support and supervision from the school, and student-initiated groups, which received no such support. A student-initiated group met during the school lunch period to discuss topical issues and read passages from the Bible. The American Civil Liberties Union filed suit against the school board, asking that the policy, as applied, be declared unconstitutional. The suit was dropped when a newly elected school board promulgated a new policy that allows only sponsored clubs.

These examples illustrate the prevailing confusion as local authorities attempt to operate the schools in the face of conflicts between the cases decided by this Court and the lower federal courts. The Court should grant petitioners' writ to resolve this issue by announcing a clear rule for the nation permitting equal access to school facilities.

II. This Court should grant the writ to uphold the principle of neutrality

The Lubbock School Board has formulated a neutral, non-preferential policy that allows equal access to school facilities for all types of student groups wishing to meet. The policy "neither advances nor inhibits religion." See *Abington School District* v. *Schempp,* 374 U.S. 203, 222 (1963). Merely allowing students to meet for prayer and religious discussions, pursuant to a policy allowing students to meet for a broad variety

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[7] At trial, however, the president of the Lubbock Civil Liberties Union, a professor of constitutional law, testified that the policy was not facially unconstitutional (Tr., at 28) and that despite widespread publicity concerning the litigation respondent had received no complaints concerning the policy as applied. (Tr. at 27-28.)

[8] The District Court's unpublished opinion is reprinted as Appendix B to the Petition for Certiorari. The quoted statement is found at page 31a of the Appendix.

[9] Petition for Certiorari, Appendix B, at 33a.

[10] Petition for Certiorari, Appendix A, at 13a.

[11] *Id.*, at 16a.

[12] *Id.*, at 17a.

[13] *Id.*, at 18a-20a.

[14] *See* Petition for Certiorari, Appendix D.

[15] *Id.*, at 41a.

of purposes, is consistent with this Court's long-established requirement that States act in a manner neutral toward religious and non-religious activities. This principle was first articulated by this Court, through Mr. Justice Black, in *Everson* v. *Board of Education*, 330 U.S. 1, 18 (1947):

"[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."

In fact, this Court has consistently required governmental neutrality toward religion. See *Roemer* v. *Board of Public Works*, 426 U.S. 736, 745-46 (1976) ("The Court has enforced a scrupulous neutrality by the State, as among religions, and also as between religious and other activities, but a hermetic separation of the two is an impossibility it has never required." [footnote omitted]); *Lemon* v. *Kurtzman*, 403 U.S. 602, 616 (1971) ("Our decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials.");[18] *Walz* v. *Tax Commission*, 397 U.S. 664, 669 (1970) ("Short of those expressly proscribed governmental acts [governmentally established religion or governmental interference with religion] there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."); *Board of Education* v. *Allen*, 392 U.S. 236, 249 (1968) (Harlan, J., concurring) ("The attitude of government toward religion must, as this Court has frequently observed, be one of neutrality."); *Abington School District* v. *Schempp*, 374 U.S. 203, 215, 218, 222, 225, 299, 306 (1963); *Engel* v. *Vitale*, 370 U.S. 421, 443 (1962) (Douglas, J., concurring) ("The First Amendment leaves the Government in a position not of hostility to religion but of neutrality.").

The equal access policy instituted by the Lubbock School District satisfies the requirement of neutrality. As this Court stated in *Widmar*, a non-preferential policy permitting all student groups to have equal access to university facilities reflects a secular purpose, 454 U.S. at 271-72, and "[t]he provision of benefits to [a] broad . . . spectrum of groups is an important index of secular effect," *id.* at 274. By contrast, the Fifth Circuit's decision in *Lubbock* violates the neutrality principle by requiring the State to become the adversary of public school students who wish to engage in religious activities. Under *Lubbock*, school boards would be required to screen all voluntary groups that are meeting or desire to meet and deny equal access to school facilities when religious content is discovered. Such State involvement is precisely the sort of entanglement that this Court's rulings under the Establishment Clause have sought to prevent. *Widmar* v. *Vincent*, *supra*, 454 U.S. at 269, n.6.

III. This Court should grant the writ to protect students' rights of free speech and assembly

This Court has emphatically stated that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969). Religious discussion and worship are "forms of speech and association protected by the First Amendment." *Widmar* v. *Vincent*, *supra*, 454 U.S. at 269. Consequently, students must be permitted to exercise their Free Speech and Association rights, including the right to engage in speech with religious content, unless the conduct "would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school . . . .'" *Tinker*, *supra*, 393 U.S. at 509, *citing Burnside* v. *Byars*, 363 F.2d 744, 749 (5th Cir. 1966). In the instant case there is no indication whatsoever that voluntary meetings outside school hours would disrupt discipline in the school.

Furthermore, this Court has held that where the facilities of a public university are made generally available to students for the exercise of their rights of speech and assembly, they cannot be denied to other students who wish to engage in religious speech and assembly. *Widmar* v. *Vincent*, supra, 454 U.S. 263. The Lubbock School District permits other voluntary student groups to use school facilities. It should also be permitted to allow religious-oriented groups to meet. Indeed, as held in *Tinker*, "the prohibition of expression of *one particular opinion*, at least without evidence that it is necessary to avoid material and substantial interference with school-work or discipline, is not constitutionally permissible." 393 U.S. at 511 (emphasis added). Since students may discuss the inquiry of Jean-Paul Sartre whether there is a God, they should also be permitted to discuss the conviction of Saul of Tarsus, that there is. See *Widmar* v. *Vincent*, supra, 454 U.S. at 277 (Stevens, J., concurring).

Under Supreme Court precedent the Lubbock School District's Board of Trustees must allow student expressions of opinion. The Fifth Circuit decision would require the Board to prohibit student expressions about religion. Such content-based regulation of speech deprives students of their Free Speech rights.

CONCLUSION

Amici curiae respectfully request that the petition of the Lubbock Independent School District be granted to reaffirm governmental neutrality toward religion. *Lubbock* should be reviewed and reversed to assure nondiscriminatory access to public school facilities for voluntary student meetings.

Respectfully submitted,

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December 14, 1982.●

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[18] The Court in *Lemon* described the types of neutral facilities and services that school districts can provide: "Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause." 403 U.S. at 616-17. See also *Board of Education* v. *Allen*, 392 U.S. 236 (1968). The classrooms made available in the present case on an equal basis to all student groups are also neutral facilities.

Senator **Hatch**. Thank you, Senator Hatfield.

Do either of my colleagues have any questions?

Senator **Metzenbaum**. No; thank you.

Senator **DeConcini**. No, I have no questions.

Senator **Hatch**. We are grateful for you coming, and grateful for the time that you have given to our committee. We appreciate your being here.

Senator **Hatfield**. Thank you very much.

Senator **Hatch**. Thank you so much.

Mr. Schmults, we will turn to you now. Please go ahead.

STATEMENT OF HON. EDWARD C. SCHMULTS, DEPUTY ATTORNEY GENERAL OF THE UNITED STATES

Mr. **Schmults**. Mr. Chairman, let me say that I realize that you and the other members of the committee have to be on the Senate floor, and I know how important that is. I will try and summarize my statement. Incidentally, I certainly understand, and I am sure the other witnesses do, too, that that is something you absolutely have to do.

Senator **Hatch**. We appreciate that. It is important that every witness summarize his testimony. We have a huge number of witnesses here today, and although I cannot stay to hear them all, I know Senator Thurmond will appreciate that.

But we will put all written statements in the record as though completely delivered here before this committee.

Senator **Metzenbaum**. Mr. Chairman, may I make an inquiry?

Senator **Hatch**. Yes.

Senator **Metzenbaum**. Many committees use the procedure of limiting witnesses to 5 minutes and then have the red light go on. Do you intend to do so? With the number of witnesses you have, it seems to me that might be an appropriate rule, although it is yours to decide.

Senator **Hatch**. I think what we decided to do is that we would let Deputy Attorney General Schmults testify; he understands that we would like him to keep within a short timeframe. Panels 1 and 2 have been each provided 15 minutes per witness. Following panels 1 and 2, subsequent panels will have 7 minutes for each witness. We hope that they will live within that, indeed we hope that they will be a little shorter.

Senator **Metzenbaum**. Mr. Chairman, I really do not wish to engage in a controversy with you, but if you allow 15 minutes for the first two panels and then 7 minutes for each of the others, we ought to be here until about 7 o'clock tonight, as I figure it.

Senator **Hatch**. It will be a very interesting day, but I might mention that this was at the request of our Democratic colleagues on this committee that we have that type of a timeframe. Now, I hope that all witnesses will keep within the timeframe that we have set; let us use the lights.

Senator **Metzenbaum**. I have to tell you, there are Democrats and Democrats. I did not make that request. But you go ahead.

Senator **Hatch**. I appreciate your argument, Senator Metzenbaum, but we had better try and do it according to the schedule.

Senator **Metzenbaum**. Thank you, Mr. Chairman.

Senator HATCH. Mr. Schmults.

Mr. SCHMULTS. Thank you, Mr. Chairman.

I am pleased to appear again on behalf of the administration to discuss proposals to amend the Constitution to restore the opportunity to engage in prayer in our public schools and institutions.

In April, I appeared before the Subcommittee on the Constitution to support Senate Joint Resolution 73, an amendment proposed by the administration and introduced in the Senate by Senators Thurmond, Hatch, Chiles, Abdnor, Nickles, and Helms. As I stated at that time, the President strongly supports Senate Joint Resolution 73, and I again urge the committee to give this proposed amendment its support. In our view, this amendment is a sound and necessary solution to the problems resulting from the prohibition of prayer in our public schools and institutions.

More recently, a different type of school prayer amendment has been considered by this committee and reported out by the Subcommittee on the Constitution. This new proposed amendment is much more limited in scope, as it relates only to silent meditation in public schools and to the use of school facilities by voluntary student religious groups.

I would like to briefly summarize the President's proposed amendment before addressing the new proposal before the committee.

The President has proposed an amendment to the Constitution in order to permit, once again, voluntary prayer in public schools and other public institutions. It is intended to reverse the effect of two decisions of the Supreme Court, the *Engel* case and the *Abington School District* case, which held that it is an impermissible "establishment of religion" in violation of the first amendment for a State to foster group prayer or Bible readings by students in public schools. In the years following these two cases, the courts have increasingly restricted the States from incorporating religious observances into the daily schedule of students in public schools. These cases have forbidden voluntary prayers in the classroom setting.

More recent decisions have forbidden periods of silent prayer, even voluntary meetings for educational, religious, moral, or ethical purposes. Even the venerable tradition of having chaplains open legislative sessions with a prayer—a tradition going back before the First Congress and widely followed in the States—is now under serious attack in the courts.

Against the background of these decisions, the President has proposed a constitutional amendment that will, in his words "restore the simple freedom of our citizens to offer prayer in our public schools and institutions."

We believe that the administration's proposed amendment would restore prayer to a place in public life consistent with the Nation's heritage and, in our view, would accurately reflect the historical background of the establishment clause. The establishment clause should not be read to prohibit governmental references to or affirmations of belief in God.

The proposed amendment affirms the fundamental right of every person to reject any religious belief, as he or she deems fit, and not participate in the expression of any religious belief.

In contrast to the President's proposed amendment, Senate Joint Resolution 73, the other constitutional amendment approved by the Subcommittee on the Constitution is much more limited in scope. It would address only two narrow aspects of the current controversy over school prayer, silent meditation and voluntary prayer meetings. In all other respects, it would leave the establishment clause jurisprudence developed by the Supreme Court and the other Federal courts untouched. Moreover, it would amend the Constitution with respect to these subjects, even though the Supreme Court has not yet had the opportunity to determine whether these activities are in fact prohibited under the current interpretations of the establishment clause.

With respect to periods of silent prayer or medication, it appears that some 18 States have enacted laws or ordinances providing for or requiring such observances of silence. In litigation challenging these laws, two have been held unconstitutional as an establishment of religion; one has been held as constitutional, and one is the subject of a pending challenge. However, the Supreme Court has never been presented with this question, and therefore, the constitutionality of the practice of silent prayer or meditation has not been finally determined under the existing construction of the establishment clause.

With respect to the use of school facilities by voluntary student groups for prayer meetings, the state of the law at present is even more favorable. Although several lower court decisions have ruled against the validity of such practices, other cases, including a recent decision of the Supreme Court, suggest that a policy of nondiscrimination or equal access of student religious groups to school facilities on the same basis as other student groups does not violate the Constitution and indeed, may be constitutionally mandated in certain circumstances.

The Supreme Court case, the *Widmar* case, which is cited in my testimony, arose in the context of a State university which had a policy of permitting all student groups to meet in its facilities, but which, nevertheless, sought to exclude religious student groups. The Court held that the university could not constitutionally exclude the student religious groups. Having created an open forum for student groups, the university could not then enforce a content-based discrimination against certain groups on the basis of the religious content of their speech.

Although the *Widmar* decision was in the university setting, the constitutional principles of that case may well be applicable in other contexts as well. To the extent that a high school has a policy of promoting extracurricular activities by students in a context that may be said to reflect an open forum, *Widmar* may be read to forbid a content-based discrimination against religious speech in that context, as well. Indeed, a recent decision of a District Court in the State of Pennsylvania has applied the *Widmar* principle to hold unconstitutional a high school's refusal to grant equal access to a religious group to hold meetings during a student activity period. Thus, although there will undoubtedly be further litigation over the constitutionality of this practice below the college level, there are several encouraging signs that the equal access principle is not unconstitutional under present constitutional doctrines.

Moreover, I note that several bills have been introduced in the Senate which are intended to extend the *Widmar* principle to the high school or the elementary school level and to provide a statutory basis of authority for the requirement of nondiscrimination. The Secretary of Education in his earlier testimony has endorsed the general purpose of these bills, and the President has voiced support as well. We believe that this is an appropriate subject for legislation to ensure equal access to school meeting facilities by student religious groups.

Thus, the proposed new amendment would establish a new constitutional rule with respect to questions that have not yet been finally determined to be unconstitutional, and which might well be held valid under current Supreme Court precedents. Legislation and the results of litigation over the current meaning of the establishment clause may accomplish essentially the result as the proposed new constitutional amendment. For these reasons, the arduous task of a constitutional amendment with respect to equal access and silent meditation would seem to be premature.

At the same time, the new amendment would have no effect at all on the large number of school prayer issues that the courts have decided. The Supreme Court's decisions in the *Engel* and *Abington School District* cases would be unaffected. Any prayers conducted in the classroom context, even if voluntary and with parental consent, would still be forbidden. Individual prayers such as grace before meals would still be suspect if said aloud, and prayers in the context of student assemblies or graduation ceremonies would also not be within the terms of the amendment. In short, the new amendment would fail to address a number of the principal concerns that led the President initially to propose his amendment.

Like the authors of the new proposed amendment on school prayer, the administration believes that the courts have unreasonably restricted the rights of our citizens to pray in public schools and institutions. Our common goal is to restore the opportunity for students to engage in prayer in our public schools. We, however, seek to achieve this objective through an amendment that confronts the problem directly, by addressing the Supreme Court's rulings in the *Engel* and the *Abington* cases. The administration's proposed amendment would restore the opportunity for public prayer, whether spoken or silent, in public schools and other institutions, and would ensure that decisions regarding prayer would be made by States and localities rather than by the Federal judiciary. This amendment would overturn the exclusion of religion from public institutions under current judicial interpretations of the establishment clause.

Notwithstanding the formidable obstacles to the enactment of any constitutional amendment, and some of the objections raised with respect to the President's proposed amendment, we believe that the approach and result of Senate Joint Resolution 73 are the correct ones and would result in the adoption of a proper new interpretation of the Constitution with respect to school prayer.

We recognize that the new proposed amendment would resolve any remaining constitutional questions regarding silent meditation and voluntary student religious groups. However, it is at the same time an incomplete remedy. It would affect only two specific areas of the broader questions relating to public prayer, and would leave essentially undisturbed the Supreme Court's pronouncements in this field. Moreover, it would constitutionalize two of the specific questions which the Supreme Court has not yet had the opportunity to evaluate under current constitutional standards.

For these reasons, we adhere to the President's initial proposal and urge prompt action on Senate Joint Resolution 73, so that the process of State ratification can begin.

Thank you very much, Mr. Chairman. I would be happy to answer any questions you may have.

[The following was received for the record:]

PREPARED STATEMENT OF EDWARD C. SCHMULTS

Mr. Chairman and Members of the Committee:

I am pleased to appear again today on behalf of the Administration to discuss proposals to amend the Constitution to restore the opportunity to engage in prayer in our public schools and institutions.

In April, I appeared before the Subcommittee on the Constitution to support Senate Joint Resolution 73, an amendment proposed by the Administration and introduced in the Senate by Senators Thurmond, Hatch, Chiles, Abdnor, Nickles and Helms. That resolution embodies the President's proposed amendment to the Constitution, which reads as follows:

> "Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer."

As I stated at that time, the President strongly supports S.J. Res. 73, and I again urge the Committee to give this proposed amendment its support. In our view, this amendment is a sound and necessary solution to the problems resulting from the prohibition of prayer in our public schools and institutions.

More recently, a different type of school prayer amendment has been considered by this Committee and reported out by the Subcommittee on the Constitution. This new proposed amendment is much more limited in scope, as it relates only to silent meditation in public schools and to the use of school facilities by voluntary student religious groups. The language of the new proposal is as follows:

> Sec. 1. Nothing in this Constitution shall be construed to prohibit individual or group silent prayer or meditation in any public school. Neither the United States nor any State shall require any person to participate in prayer or meditation, nor shall they encourage any particular form of prayer or meditation.
>
> Sec. 2. Nothing in this Constitution shall be construed to prohibit equal access to the use of public school facilities by all voluntary student groups.

I would like to briefly summarize the President's proposed amendment before addressing the new proposal before the Committee.

I.

The President has proposed an amendment to the Constitution in order to permit, once again, voluntary prayer in public schools and other public institutions. It is intended to reverse the effect of two decisions of the Supreme Court, Engel v. Vitale, 370 U.S. 421 (1962), and Abington School District v. Schempp, 374 U.S. 203 (1963), which held that it is an impermissible "establishment of religion" in violation of the First Amendment for a state to foster group prayer or Bible readings by students in public schools. In the years following Engel v. Vitale and Abington School District v. Schempp, the courts have increasingly restricted the states from incorporating religious observances into the daily schedule of students in public schools. These cases have forbidden voluntary prayers in the classroom setting. 1/ More recent decisions have forbidden periods of silent prayer, 2/ and voluntary meetings for "educational,

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[1] Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), aff'd mem., 102 S. Ct. 1267 (1982) (voluntary prayer at start of class for students with parental permission); Stein v. Oshinsky, 348 F.2d 999 (2d Cir.), cert. denied, 382 U.S. 957 (1965) (grace before meals).

[2] See, e.g., Jaffree v. Wallace, No. 83-7046 (11th Cir. May 12, 1983); Duffy v. Las Cruces Public Schools, 557 F. Supp. 1013 (D.N.M. 1983); Beck v. McElrath, 548 F. Supp. 1161 (M.D. Tenn. 1982).

religious, moral, or ethical purposes." 3/ Even the venerable tradition of having chaplains open legislative sessions with a prayer -- a tradition going back before the First Congress and widely followed in the states -- is now under serious attack in the courts. 4/

Against the background of these decisions, the President has proposed a constitutional amendment that will, in his words, "restore the simple freedom of our citizens to offer prayer in our public schools and institutions." We believe that the Administration's proposed amendment would restore prayer to a place in public life consistent with the Nation's heritage and, in our view, would accurately reflect the historical background of the Establishment Clause. The Establishment Clause should not be read to prohibit governmental references to or affirmations of belief in God. 5/

As the Supreme Court has stated, "We are a religious people whose institutions presuppose a Supreme Being." Zorach v. Clauson, 343 U.S. 306, 313 (1952). The free expression of prayer

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[3] Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038, 1042-48 (5th Cir. 1982), cert. denied, 103 S. Ct. 800 (1983); see also Collins v. Chandler Unified School Dist., 644 F.2d 759 (9th Cir.), cert. denied, 102 S. Ct. 322 (1981); Brandon v. Board of Education, 635 F.2d 971, 977-79 (2d Cir. 1980), cert. denied, 102 S. Ct. 970 (1981); Trietley v. Board of Education, 65 A.D.2d 1, 409 N.Y.S.2d 912 (1978).

[4] One federal court of appeals has already ruled that it is unconstitutional for a state legislature to have a chaplain to open its sessions with a prayer, Chambers v. Marsh, 675 F.2d 228 (8th Cir. 1982), cert. granted, 103 S. Ct. 292 (1982) (No. 82-23), and a similar challenge to chaplains in Congress is now pending. Murray v. Buchanan, 674 F.2d 14 (D.C. Cir. 1982), vacated for rehearing en banc, No. 81-1301 (D.C. Cir.).

[5] In discussing the scope of the Establishment and Free Exercise Clauses, Erwin N. Griswold, former Dean of Harvard Law School and former Solicitor General of the United States, stated: "These are great provisions, of great sweep and basic importance. But to say that they require that all traces of religion be kept out of any sort of public activity is sheer invention." Griswold, Absolute is in the Dark--A Discussion of the Approach of the Supreme Court to Constitutional Questions, 8 Utah L. Rev. 167, 174 (1963).

is of such fundamental importance to our citizenry that it should not be proscribed from public places. The overwhelming majority of Americans have repeatedly made it clear that they favor a restoration of voluntary prayer to the public schools. The exclusion of prayer from the daily routine of students could convey the misguided message that religion is not of high importance in our society. Moreover, some of the courts' Establishment Clause cases have appeared to overshadow the First Amendment right of students to free exercise of religion.

Finally, the President proposed his amendment to allow decisions of essentially local concern to be made by states and localities rather than the federal judiciary. For over 170 years, school prayer issues were resolved at the state and local levels by the residents of the affected communities. Their choices regarding school prayer reflected the desires and beliefs of the parents and children who were directly and substantially affected.

Accordingly, the President's proposed constitutional amendment is essentially intended to restore the status quo with respect to the law governing prayer in public schools that existed before Engel v. Vitale and Abington School District v. Schempp were decided, i.e., when prayers such as the Regents' prayer and readings from the Bible without comment were not thought to be unconstitutional. However, the proposed amendment affirms the fundamental right of every person to reject any religious belief, as he or she deems fit, and not participate in the expression of any religious belief.

II.

In contrast to the President's proposed amendment, S.J. Res. 73, the other constitutional amendment approved by the Subcommittee on the Constitution is much more limited in scope.

It would address only two narrow aspects of the current controversy over school prayer, silent meditation and voluntary prayer meetings. In all other respects, it would leave the Establishment Clause jurisprudence developed by the Supreme Court and the other federal courts untouched. Moreover, it would amend the Constitution with respect to these subjects even though the Supreme Court has not yet had the opportunity to determine whether these activities are in fact prohibited under current interpretations of the Establishment Clause.

Just as the President's amendment would not create new affirmative constitutional rights with respect to school prayer, the new amendment is apparently not intended to create new rights for students. Both sections of the new proposal merely provide that the Constitution shall not be construed to affect the conduct described in its provisions.

With respect to periods of silent prayer or meditation, it appears that some 18 states have enacted laws or ordinances providing for or requiring such observances of silence. 6/ In litigation challenging these laws, two have been held unconstitutional as an establishment of religion, one has been held as constitutional, and one is the subject of a pending court challenge. 7/ However, the Supreme Court has never been presented with this question, and therefore the constitutionality

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[6] See Note, Daily Moments of Silence in Public Schools: A Constitutional Analysis, 58 N.Y.U. L. Rev. 364, 372 n.44 (1983).

[7] Courts in Tennessee and New Mexico have ruled against silent prayer or meditation. See cases cited in note 2, supra. The district court in Gaines v. Anderson, 421 F. Supp. 337 (D. Mass. 1976) (three-judge court), upheld a Massachusetts law requiring that "a period of silence not to exceed one minute in duration shall be observed for meditation or prayer . . . " at the start of class. A similar New Jersey law is under challenge in May v. Cooperman, No. 83-89 (D.N.J.).

of the practice of silent prayer or meditation has not been finally determined under the existing construction of the Establishment Clause.

With respect to the use of school facilities by voluntary student groups for prayer meetings, the state of the law at present is even more favorable. Although several lower court decisions have ruled against the validity of such practices, 8/ other cases, including a recent decision of the Supreme Court, suggest that a policy of non-discrimination or equal access of student religious groups to school facilities on the same basis as other student groups does not violate the Constitution and indeed may be constitutionally mandated in certain circumstances.

The Supreme Court case, Widmar v. Vincent, 454 U.S. 263 (1981), arose in the context of a state university which had a policy of permitting all student groups to meet in its facilities but which nevertheless sought to exclude religious student groups. The Court held that the university could not constitutionally exclude the student religious groups. Having created an open forum for student groups, the university could not then enforce a content-based discrimination against certain groups on the basis of the religious content of their speech.

Although the Widmar decision was in the university setting, the constitutional principles of that case may well be applicable in other contexts as well. To the extent that a high school has a policy of promoting extracurricular activities by students in a context that may be said to reflect an open forum, Widmar may be read to forbid content-based discrimination against religious speech in that context as well. Indeed, a recent district court decision in Pennsylvania has applied the Widmar

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[8] See cases cited in note 3, supra.

principle to hold unconstitutional a high school's refusal to grant equal access to a religious group to hold meetings during an extracurricular student activity period. 9/ Thus, although there undoubtedly will be further litigation over the constitutionality of this practice below the college level, there are several encouraging signs that the equal access principle is not unconstitutional under present constitutional doctrines.

Moreover, I note that several bills have been introduced in the Senate which are intended to extend the Widmar principle to the high school or the elementary level and to provide a statutory basis of authority for the requirement of nondiscrimination. 10/ The Secretary of Education in his earlier testimony has endorsed the general purpose of these bills, and the President has voiced support as well. We believe that this is an appropriate subject for legislation to ensure equal access to school meeting facilities by student religious groups.

Thus, the proposed new amendment would establish a new constitutional rule with respect to questions that have not yet been finally determined to be unconstitutional, and which might well be held valid under current Supreme Court precedents. Legislation and the results of litigation over the current meaning of the Establishment Clause may accomplish essentially the result as the proposed new constitutional amendment. For these reasons, the arduous task of a constitutional amendment with respect to equal access and silent meditation would seem to be premature.

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[9] Bender v. Williamsport Area School District, No. 82-0692 (M.D. Pa. May 12, 1983).

[10] These bills are S. 425 and S. 1059, introduced by Senator Denton, and S. 815, introduced by Senator Hatfield and cosponsored by a number of other Senators.

At the same time, the new amendment would have no effect at all on the large number of school prayer issues that the courts have decided. The Supreme Court's decisions in Engel v. Vitale and Abington School District v. Schempp would be unaffected. Any prayers conducted in the classroom context, even if voluntary and with parental consent, would still be forbidden. [11] Individual prayers such as grace before meals would still be suspect if said aloud, and prayers in the context of student assemblies or graduation ceremonies would also not be within the terms of the amendment. In short, the new amendment would fail to address a number of the principle concerns that led the President initially to propose his amendment. [12]

Finally, I note briefly my concern over the breadth of the second sentence of the first section of the new amendment. On its face, this sentence, which would prohibit the United States or any State from requiring participation in meditation or from encouraging any particular form of prayer or meditation, would seem to apply broadly as a prohibition on actions by the federal or state authorities, even beyond the subject of silent prayer or meditation. This sentence should be given careful consideration to determine if it is even necessary in light of the nature of silent meditation, and to ensure that it would not be applicable to circumstances not intended by its authors.

III.

Like the authors of the new proposed amendment on school prayer, the Administration believes that the courts have unreasonably restricted the rights of our citizens to pray in public schools and institutions. Our common goal is to restore the opportunity for students to engage in prayer in our public schools. We, however, seek to achieve this objective through an amendment that confronts the problem directly by addressing the Supreme Court's rulings in Engel v. Vitale and Abington School District v. Schempp. The Administration's proposed amendment would restore the opportunity for public prayer, whether spoken or silent, in public schools and other institutions, and would ensure that decisions regarding prayer would be made by states and localities rather than by the federal judiciary. This amendment would overturn the exclusion of religion from public institutions under current judicial interpretations of the Establishment Clause.

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[11] See Karen B. v. Treen, supra.

[12] The new proposed amendment also is limited only to public schools, and would therefore not reach the question of public prayer in other public institutions as does S.J. Res. 73.

Notwithstanding the formidable obstacles to the enactment of any constitutional amendment, and some of the objections raised with respect to the President's proposed amendment, we believe that the approach and result of S.J. Res. 73 are the correct ones and would result in the adoption of a proper new interpretation of the Constitution with respect to school prayer.

We recognize that the new proposed amendment would resolve any remaining constitutional questions regarding silent meditation and voluntary student religious groups. However, it is at the same time an incomplete remedy. It would affect only two specific areas of the broader questions relating the public prayer, and would leave essentially undisturbed the Supreme Court's pronouncements in this field. Moreover, it would constitutionalize two of the specific questions which the Supreme Court has not yet had the opportunity to evaluate under current constitutional standards.

For these reasons, we adhere to the President's initial proposal, and urge prompt action on S.J. Res. 73, so that the process of state ratification can begin. We began our national history with an unforgettable Declaration that governments were instituted in order to secure to the people those inalienable rights, including life, liberty and the pursuit of happiness, with which people were "endowed by their Creator." Those rugged and inspired individuals who founded this nation understood the importance of recognizing the source of our blessings. It is time that we restore the ability of our schoolchildren to do so as well.

Mr. Chairman, I shall be glad to answer any questions you or members of the Committee might have.

[Whereupon, Senator Thurmond resumed the Chair.]

The CHAIRMAN. Thank you very much, Mr. Schmults.

The distinguished Senator from Utah has to go to the floor on the abortion question in just a few minutes, so I am going to yield to him first.

Senator HATCH. Thank you, Mr. Chairman.

Mr. Schmults, you argue that the proposed subcommittee amendment is narrow—the alternative amendment on silent prayer and meditation—and would not affect other aspects of the establishment clause jurisprudence. I guess that I would agree with that point.

Would you define for us what other aspects of the establishment clause you would like to amend?

Mr. SCHMULTS. Principally, our concern is to restore the state of constitutional law to what it was for 170 years, before the two Supreme Court cases in the early 1960's. I think there can be some concern raised—and I certainly do not want to emphasize this—with respect to what we call the new amendment. We do not know what the negative implications of that are. If you constitutionalize meditation, silent prayer, I do not know what this means for invocations at high school graduation ceremonies. I do not know what it means with respect to chaplains in other public institutions and so forth. So we are concerned that there may be some negative implications of constitutionalizing silent meditation.

Senator HATCH. You argue that it may be advisable to wait longer on the silent prayer issue to see whether the Supreme Court will act on it. Would you not agree that reasonable individuals could conclude, in light of earlier court decisions, that silent prayer would be in violation of the Constitution just as much as any other kind of prayer?

Mr. SCHMULTS. Yes, sir, I think that reasonable people could conclude that.

Senator HATCH. Actually, of the five Federal court decisions so far, four have concluded that silent prayer is unconstitutional.

Would you agree that there is no obligation upon the Court to act upon this issue at any time and that we may not have the benefit of a Court decision on this issue for many years to come, if ever?

Mr. SCHMULTS. It is very difficult to predict when the Supreme Court will address an issue, that is correct.

Senator HATCH. Would you agree that the fact that 4 out of 5 of the Federal courts that have looked into this issue have concluded that silent prayer is unconstitutional may well be reason enough for silent prayer proponents to conclude that the proposed amendment is necessary?

Mr. SCHMULTS. Well, Senator Hatch, our goals are certainly the same, and I certainly can understand those concerns, and I can certainly understand why some people might conclude a silent prayer amendment would be desirable.

I think that the administration's position—the President's position and those who support his amendment—is that, if you are going to engage in a long fight to amend the Constitution, to settle for a period of silent meditation is not really enough. What we ought to be doing when we amend the Constitution is to restore it to the status that it had as the founders intended it, the way it existed for 170 years in this country, before those two Supreme Court cases in 1962, and not to address those cases in a constitutional amendment that, we believe, is less desirable than what the President is proposing.

Senator HATCH. I think it may be enough to reaffirm the proper understanding of the first amendment's establishment clause that there is a proper, supportive role for the State so far as expressions of religious value are concerned. You are right, however; we are both working to try and do the same thing.

Mr. SCHMULTS. Yes, sir.

Senator HATCH. I think you would agree with me, would you not, that the state of law in this area is, at best, confused; that communities throughout the country are effectively chilled in the exercise of even silent prayer, and that a constitutional amendment does not represent a totally irrational response to this situation.

Mr. SCHMULTS. Well, that is certainly correct.

Senator HATCH. You mentioned that 18 States have laws on their books relating to prayer. But I think you also know that there are some 20 or 30 States which also have laws relating to abortion on their books. The issue is whether or not such laws are obsolete or unconstitutional, but still maintained on the books, or whether they are presently viabile. I doubt in both instances that they are of much current effect.

So we are concerned, as you are, with trying to change this and restore what the Founding Fathers really meant when they devised with the "establishment" clause.

Mr. SCHMULTS. Absolutely. We believe that the American people want a change here. I am sorry that Senator Metzenbaum is not here, but I must say, I certainly did not understand his statement about the immorality of changing the Constitution. I do not understand that at all. I think he is wrong. He talks about the people who came to this country for freedom, to our shores. Of course, the great waves of immigration to this country came during a period when we had school prayer in our public schools, so I just really did not understand Senator Metzenbaum's reasoning.

Senator HATCH. And one of the major reasons they came was so they could worship freely and maintain the religious values they wanted to in a free land.

Mr. SCHMULTS. Yes, sir.

Senator HATCH. Thank you, Mr. Chairman. I appreciate your letting me ask questions out-of-turn.

The CHAIRMAN. Thank you.

Mr. Schmults, the Supreme Court has established in this country, a wall of separation, complete neutrality, in matters dealing with government involvement with religion. Mr. Schmults, how do you interpret the original intent of the framers of the Constitution and the Bill of Rights in relation to the separation of church and state, and in what ways does your interpretation differ from that of the Supreme Court?

Mr SCHMULTS. Well, first of all, the phrase, "wall of separation," appears nowhere in the Constitution. I would agree with Senator Hatfield when he said that the current position that State and local governments have to assume, as a result of the Supreme Court decisions, is not really one of neutrality, but really, one that borders close to hostility.

So I think it is clear that the framers, while they intended that Congress not establish a national religion, certainly did not intend to banish religion from our public institutions and public ceremonies and institutions. Accordingly, the President's amendment would restore the status of school prayer in public schools to that which our founders, the framers of our Constitution, envisioned. Certainly—and I return to this point time and time again—that is the way it existed for 170 years in this country. Those people who devised the Constitution and the early interpreters of the Constitution certainly did not envision that school prayer had to be banned from our public schools.

The CHAIRMAN. In fact, wasn't one of the main reasons, if not the chief reason, that people came to this country to seek religious freedom?

Mr. SCHMULTS. Yes, sir

The CHAIRMAN. And for how many years did we allow prayers in schools before the Supreme Court declared it unconstitutional?

Mr. SCHMULTS. I think over 170 years.

The CHAIRMAN. Over 170 years. Isn't it kind of strange that it took the Supreme Court that long to decide we could not have prayers in schools?

Mr. SCHMULTS. Yes.

The CHAIRMAN. Do you feel that school prayer can be carried out with discriminating against any one religion, and do you feel that this nondiscriminatory school prayer will have associated positive effects, even secular positive effects, on our young and the country in general?

Mr. SCHMULTS. The answer to both questions is yes. The President's proposal very carefully states that neither the United States, nor any State, can compel any person in any way, shape, or form to participate in prayer. There is the freedom to do so or not to do so. I think what we have seen is the alleged rights of the minority here overwhelming the rights of the majority. I think those who want to pray in public schools should have the right to do so, and those who do not wish to do so should not have to participate. The President's amendment would make clear there could be no compulsion or any requirement whatsoever. It would protect that absolutely. Indeed, we think it is already protected under the Constitution, but we have made that clear in the amendment.

The CHAIRMAN. The President's recommendation is clear that it would only be those who volunteered to pray, and no one would be compelled to; isn't that correct?

Mr. SCHMULTS. That is correct.

The CHAIRMAN. Mr. Schmults, do you see Senate Joint Resolution 73—the President's recommendation—as a clarifying amendment to the Constitution, or feel it will add additional language and intent to the Constitution?

Mr. SCHMULTS. Well, my answer to that would be that we think the amendment would restore the constitutional doctrine in this area to what the framers intended and the way it existed for 170 years and, hence, is desirable. And we certainly see nothing wrong. There is a criticism being leveled that, somehow, there will be State compulsory prayer. That is not right. People, schoolchildren, will have the freedom not to participate, and we believe that we can trust the people in this country, the local parent-teacher associations, student groups and others, to devise, if they wish—no one is required to do so—a form of prayer that would best suit the local community and the local school. We see that as something desirable, not having the Federal courts and the Federal Government tell our people what to do about their prayers.

The CHAIRMAN. At what level of government do you foresee school prayer policies being made if Senate Joint Resolution 73 becomes part of the Constitution?

Mr. SCHMULTS. Well, we think it would be made at the lowest level of government—each community, each town, each classroom perhaps. It could be devised in any one of a number of ways. Or, there could be no prayer. If a State wished to bar prayer from the public schools, of course, it could do so. We would leave it to those at the lowest level. And certainly, our traditions indicate that we are safe in doing that. Our history in this country has been one of great toleration for religious diversity. This amendment would return this power to the people, if you will, that the Federal courts took away in the 1960's, in a way we believe contrary to the spirit of the framers of the Constitution. We see that as a desirable thing to do, Mr. Chairman.

The CHAIRMAN. Mr. Schmults, what effects do you feel this amendment will have on other rulings by the courts on religious matters such as Bible reading, equal access, observance of religious holidays, and so forth?

Mr. SCHMULTS. Well, that is hard to predict, and therefore I will not make a prediction. At the Justice Department, we believe there is some reason to hope that the "equal access" concept will be one that will find its way into a constitutional doctrine, and we are hopeful that the courts will rule that way.

Senator Hatfield mentioned a recent case in the middle district of Pennsylvania, involving a high school that went along the same lines as the Supreme Court's *Widmar* case on equal access. But my suspicion would be that if this amendment were passed and put in the Constitution, it would certainly be helpful in these other areas, as well.

The CHAIRMAN. Mr. Schmults, how do you perceive the free exercise provision of this amendment? It reads: "No person shall be required by the United States or any State to participate in prayer being carried out."

Mr. SCHMULTS. Well, we think that is an ironclad guarantee of, really, religious freedom, or the freedom not to participate in prayer. That guarantee is undoubtedly in the Constitution already, but we thought that it would be desirable to include that specifically in the proposed amendment, so that it is an integral whole.

The CHAIRMAN. Mr. Schmults, several bills, I believe, have been filed on the equal access question before this committee and also, the Labor Committee. Which, if any, of those do you favor?

Mr. SCHMULTS. Well, the President has endorsed the concept of those bills. Secretary Bell has testified in favor of them. We believe that, if carefully drafted, there is an excellent chance that the courts would hold them constitutional.

I am not prepared to state at this time which particular bill we favor, but we do favor that concept. And indeed, we think legislation along this line would be more desirable now than a constitutional amendment along the same line. As Senator Hatch indicated earlier, our position—and we believe that it is the correct one—is that, at best, it is premature to address this issue now, because we think there is a reasonably good chance that the courts will hold that equal access is constitutional.

The CHAIRMAN. Has the Justice Department recommended a particular access amendment, statutory?

Mr. SCHMULTS. No, we have not, but we are certainly happy to work with the committees who are considering this to develop a bill.

The CHAIRMAN. Would you have someone in the Justice Department, then, to work closely with staff of the Judiciary Committee on that question?

Mr. SCHMULTS. Yes, sir, we would be glad to do that.

The CHAIRMAN. Thank you very much, Mr. Schmults, for your presence here.

Mr. SCHMULTS. Thank you, Mr. Chairman.

The CHAIRMAN. Our first panel today will be Prof. Robert Cord and Prof. Walter Dellinger.

We will now be pleased to hear from Prof. Robert L. Cord. Professor Cord is professor of political science at Northeastern University. He received his Ph.D. from the Maxwell School of Citizenship and Public Affairs, Syracuse University, and was a liberal arts fellow in law and political science at the Harvard School of Law.

Also appearing at this time is Prof. Walter E. Dellinger. He is an undergraduate of the University of North Carolina, and he received his bachelor of law from Yale University. He is currently professor of law at the Duke University School of Law.

We are very pleased to have you gentlemen with us, and you may proceed now.

STATEMENT OF A PANEL, INCLUDING ROBERT L. CORD, PROFESSOR OF POLITICAL SCIENCE, NORTHEASTERN UNIVERSITY, BOSTON, MA; AND WALTER E. DELLINGER, PROFESSOR OF LAW, DUKE UNIVERSITY

Professor CORD. Thank you, Mr. Chairman.

Mr. Chairman, members of the committee, and committee staff, as I did 2 months ago, I have accepted your invitation to testify before this committee about my research and my understanding of the American constitutional doctrine of separation of church and state.

It is my firm conviction that the administration's proposal, Senate Joint Resolution 73, would violate the church-state tradition that our Founding Fathers established, but that the Hatch subcommittee proposal would not. Documentation for my conclusions may be found in my most recent book, "Separation of Church and State, Historical Fact and Current Fiction," published by Lambeth Press of New York, 1982.

When I was before the subcommittee in April, I stressed that I have not accepted your invitation to argue as a partisan for or against the prayer amendment. Then, as now, I have come here to testify about my views of the historical first amendment guarantees and how they relate to the two proposed prayer amendments, Senate Joint Resolution 73, the administration's amendment, and the subcommittee's silent meditation alternative, the Hatch amendment, both of which may be voted out by this committee and therefore may reach the Senate floor.

Once again, I urge you not to support any amendment that would compromise the principles of church/state separation which the Founding Fathers of our Constitution and its first amendment so wisely embraced.

Recognizing that an amendment to our Constitution is, by definition, constitutional, I ask you not to send to the Senate any proposal which is out of harmony with either the letter or spirit of the first amendment. Additionally, I have come here to suggest that any amendment you may choose to report out should be one that strengthens those first amendment rights which in recent years have been diluted, if not denied, in the judicial process.

Not wishing to reiterate too much of what I said on April 29, I do think it desirable to reiterate some fundamental points made therein.

First, the Founding Fathers believed in separation of church and state. In my judgment, their commitment to that concept was the most distinctive contribution that the American constitutional system made to the body of political ideas and institutions.

Contrary to Senator Metzenbaum's view of what they thought, what the framers thought separation of church and state was designed to do, with the use of mostly primary historical documents, I think I show conclusively that the framers did not believe in an absolute separation, nor even a high and impregnable wall between church and state, as declared by the U.S. Supreme Court in the *Everson bus transportation* case of 1947 and its progeny. Instead, the documented public actions of the framers of the first amendment, including James Madison, and those of our early Presidents and Congresses, establish that the constitutional doctrine of separation of church and state to them meant that no national religion was to be instituted by the Federal Government, nor was any religion, religious sect, or religious tradition to be placed in a legally preferred position. It is not surprising, then, that the nondiscriminatory use by Government of religious institutions such as schools to accomplish goals within the Government's authority was not considered by the Founding Fathers a violation of the Constitution.

No matter what the Supreme Court and some prominent constitutional scholars have written, the facts show that Washington, John Adams, Jefferson, Madison, and their Congresses all used, in one way or another, what they viewed as nonpreferential sectarian means to reach secular governmental ends.

Because I believe there is a clear nationwide consensus that the power to establish a national church or religion was explicitly denied the Federal Government by the first amendment, I see no need to discuss that here. However, because of the wording of the Administration's proposed amendment, Senate Joint Resolution 73, I see a definite need to address the nonpreferential religious treatment that the framers of the first amendment endorsed.

Seen in its proper historical context, what became the first amendment's establishment clause was in part a response to "no preference" resolutions emanating from several State constitutional ratifying conventions. The Virginia Ratifying Convention proposed a "Declaration or Bill of Rights" as amendments to the Constitution, of which article XX in part stated that, "* * * no particular sect or society ought to be favored or established, by law, in preference to others."

The New York Convention similarly declared "* * * that no religious sect or society ought to be favored or established by law in preference to others."

The conventions in North Carolina and Rhode Island passed similar resolutions.

My opposition to the administration's proposed amendment is at least threefold. First, it will create the environment that provides for violations of the "no official religious preference" concept, which the Founding Fathers believed was the essential ingredient of the "establishment" clause.

Senate Joint Resolution 73 is so overbroad that it provides a constitutional imprimatur for all prayers said in public schools. On its face, Senate Joint Resolution 73 excludes no prayer. Consequently, prayers that are exclusively Christian, exclusively Jewish, exclusively Islamic, exclusively Buddhist, et cetera, would be constitutional even though they placed one religion or religious tradition into a preferred legal status. Religiously partisan prayers are certain to be written in some of this Nation's thousands of schools or school systems.

Second, as written under the administration's wording, either all voluntary prayers are constitutional, or the subject of what is appropriate prayer under the new amendment will be passed on to the courts—a happening which this amendment is, among other things, supposed to curtail.

Third, Senate Joint Resolution 73 confines itself, if at all, to reversing only the most obvious dangers to our first amendment liberties posed by the *Brandon* and *Lubbock* decisions. By comparison, the Hatch subcommittee's alternative amendment is, for me, a significantly better proposal.

First, and extremely important, the Hatch amendment, by allowing silent prayer and/or meditation only, could not be used to place any religious sect or tradition into a preferred position. Thus, this amendment would not violate what, in my judgment, is the historically authenticated concept of church-state separation which the Founding Fathers embraced

Second, by eliminating the wording of prayers which takes place under the administration's proposal, the likelihood of clashes over specific prayers being brought into the judicial process will be minimized, if not eliminated, allowing the courts to focus on other important issues on their overcrowded court calendars.

Third, the Hatch alternative allows for school districts which desire to institute a meditation moment, the constitutional authority to do so. Such moments of prayer and/or meditation are now unconstitutional in several States of the Union, irrespective of the intentions and the actions of the framers of the first amendment. Restoring the choice of instituting such a practice or not to elected public officials puts the basic decisionmaking authority back where it belongs, in the political rather than the judicial process.

Fourth, while the Hatch amendment may distress advocates of absolute church-state separation, based on their actions in public life, I do not think it would have offended the authors of the first amendment. Despite the very selective history embraced by Justices Black and Rutledge in the *Everson* case, and those opinions which have followed their historical interpretation for over 35 years, those who care to confront the evidence will see that our constitutional giants, Washington, Adams, Jefferson, and Madison did not embrace a church-state "high and impregnable wall" theory. That evidence is available in chapters 1, 2, 3, 5, 6, and 8 of "Separation of Church and State."

Fifth, the Hatch subcommittee amendment addresses and would reverse the ultimate distortion of the "establishment" clause which is manifest in the *Brandon* decision. The irony of *Brandon,* as I see it, is that the freedoms of religious worship, of speech and of voluntary assembly have been diluted because a preferred position has been given to one first amendment clause at the expense of three other first amendment clauses. The potential danger of *Brandon* is enormous. In *Lemon* v. *Kurtzman,* the Supreme Court held that a State's action violated the establishment clause if the primary effect of the action was the advancement or inhibition of religion.

Can we not see that a court which can hold today that an unused State public school classroom may not be used by students for a truly voluntary prayer group or Bible study because such use of the room might have as its primary effect the advancement of religions, can tomorrow by the same logic bar meeting rooms requested by students who want to discuss Bertrand Russell's "Why I am Not a Christian," because the primary effect there might be said to inhibit religion?

Can we not see that by the use of a court's "primary effect" test that books about religion may be plucked from our school libraries? Is C.S. Lewis "The Screwtape Letters" safe? And what about "Inherit the Wind," the Old and New Testaments, Darwin's "Origin of the Species," the Koran or the Book of Mormon?

Finally, the subcommittee proposal, unlike the administration's, would guarantee equal public school access to all voluntary student groups, including those which may discuss political, economic and/or cultural ideas as well as religious ones. In reversing the *Brandon* case, section 2 of the subcommittee's bill would restore in all of our Federal judicial circuits the free interchange of ideas, even those concerned with ultimate truths.

As I see it, section 2 keeps faith with Justice Holmes' observation that, "The best test of truth is the power of the thought to get itself accepted in the competition of the market"—even, I might add, Mr. Chairman, if the marketplace happens to be a public schoolroom.

Thank you for your time and your patience, and for inviting me to take part in these proceedings.

Thank you.

[The following was received for the record:]

PREPARED STATEMENT OF ROBERT L. CORD

Mr. Chairman, members of the committee and the committee's staff:

As I did 2 months ago, I have accepted your invitation to testify before this committee about my research and my understanding of the meaning of the American constitutional doctrine of separation of Church and State. It is my firm conviction that the administration's Prayer proposal Senate Joint Resolution 73 would violate the church-state tradition that our Founding Fathers established, but that the Hatch subcommittee's proposal would not. While time constraints here do not permit a full discussion of that important concept my analysis and documentation for my conclusions may be found in my most recent book "Separation of Church and State: Historical Fact and Current Fiction" published by Lambeth Press of New York in 1982.[1]

When I was before the subcommittee in April, I stressed that I had not accepted your invitation to argue as a partisan for or against a prayer amendment. Then, as now, I have come here to testify about my views of the historical first amendment guarantees and how they relate to the two proposed prayer amendments—Senate Joint Resolution 73, the administration's amendment, and the subcommittee's silent meditation alternative, the Hatch Amendment—both of which may be voted out by this committee and therefore may reach the Senate floor.

Once again I urge you not to support any amendment that would compromise the principles of church-state separation which the Founding Fathers of our Constitution and its first amendment so wisely embraced. Recognizing that an amendment to our Constitution is by definition constitutional, I ask you not to send to the Senate any proposal which is out of harmony with either the letter or spirit of the first amendment. Additionally I have come here to suggest that any amendment you may choose to report out should be one that strengthens those first amendment rights which in recent years have been diluted—if not denied—in the judicial process.

Not wishing to restate too much of what I said in my previous testimony of April 29—which I trust you all have and will at your leisure review—I do think it desirable to reiterate some fundamental points made therein.

First, the Founding Fathers believed in separation of church and state. In my judgment their commitment to that concept was the most distinctive contribution that the American constitutional system made to the body of political ideas and institutions. Contrary to in 1791, when the first amendment with its admonition that "Congress" shall make no law respecting an establishment of religion" was added to our Constitution, no other nation had provided so carefully to prevent the combination of the power of religion with the power of the national government. With the use of mostly primary historical documents, however, I show conclusively that the Founding Fathers did not believe in an absolute separation nor even a "high and impregnable" wall between church and state as declared by the U.S. Supreme Court in the *Everson* "Bus Transportation Case" of 1947 [2] and it progeny. Instead the documented public actions of the Framers of the first amendment, including James Madison, and those of our early Presidents and Congresses establish that the constitutional doctrine of separation of church and state to them meant that no national religion was to be instituted by the Federal Government; nor was any religion, religious sect, or religious tradition to be placed in a legally preferred position. It is not surprising then, that the nondiscriminatory use by government of religious institutions—such as schools—to accomplish goals within the government's authority was not considered by the Founding Fathers a violation of the Constitution. No matter what the Supreme Court, and some prominent constitutional scholars, have written, to the contrary, the facts show that that Washington, John Adams, Jefferson, Madison, and their Congresses, all used in one way or another, what they viewed as non-preferential sectarian means to reach secular governmental ends.

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[1] Robert L. Cord, "Separation of Church and State: Historical Fact and Current Fiction" (Lambeth Press, 143 East 37th Street, New York, N.Y. 10016).

Because I believe there is a clear nationwide consensus that the power to establish a national church or religion was explicitly denied the Federal Government by the first amendment, I see no need to discuss that here. However, because of the wording of the Administration's proposed amendment Senate Joint Resolution 73, I see a definite need to address the non-preferential religious treatment that the framers of the first amendment endorsed.

Seen in its proper historical context what became the first amendment's establishment clause was in part a response to "no-preference" resolutions emanating from several of the State Constitutional Ratifying Conventions. The Virginia Ratifying Convention proposed a "Declaration or Bill of Rights" as amendments to the Constitution, of which Article Twenty in part (adopted on June 27, 1788) stated: That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and that *no particular religious sect or society ought to be favored or established, by law, in preference to others.*[3]

The New York Convention similarly declared: That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience; and *that no religious sect or society ought to be favored or established by law in preference to others.*[4]

The Conventions in North Carolina and Rhode Island passed similar resolutions.

The identification of a non-partisan religious stance by government as an important part of disestablishmentarism or nonestablishmentarism, in my judgment, precedes and succeeds the ratification of the First Amendment. The idea of no religious preferential treatment is present in: (1) Madison's famous "Memorial and Remonstrance Against Religious Assessments" in Virginia in 1785 [5]; (2) Franklin's call in the Constitution Convention for one or more of Philadelphia's clergy to officiate at a prayer service each morning [6]; (3) the different "church building" treaties negotiated and signed by Presidents Thomas Jefferson, James Monroe, John Quincy Adams, Andrew Jackson and Martin Van Buren [7]; and (4) the granting of federal monies to at least the sixteen different Christian Mission schools which I documented in my previous testimony of April 29, 1983.[8]

My opposition to the administration's proposed amendment is at least three fold. First, it will create the environment that provides for violations of the "no official religious preference" concept which the Founding Fathers believed was the essential ingredient of an established religion or church. Senate Joint Resolution 73 is so overbroad that it provides a constitutional imprimatur for all prayers said in public schools. On its face Senate Joint Resolution 73 excludes no prayer. Consequently prayers that are exclusively Christian, Jewish, Islamic, Buddist, etc., would be constitutional even though they placed one religion or religious tradition into a preferred legal status. Religiously partisan prayers are certain to be written in some of this Nation's thousands of schools or school systems.

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[2] 330 U.S. 1 (1947).

[3] Jonathan Elliott, "Debates on the Federal Constitution," Vol. III (Philadelphia: J.B. Lippincott Co., 1901), p. 659. Emphasis added.

[4] *Ibid.*, Vol. I, p. 328. Emphasis added.

[5] Cord, "Separation," *op. cit.*, pp. 244-249.

[6] "Debates In the Federal Convention of 1787 As Reported By James Madison", "Documents Illustrative of the Formation of the Union of the American States" (Washington, D.C.: Government Printing Office, 1927), pp. 295-96.

[7] Cord, "Separation," *op. cit.*, pp. 58-60, fns. 31-39.

[8] "Annual Reports of the Commissioner of Indian Affairs:" 1824—1831, I (New York: A.M.S. Press, Inc., 1976).

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By comparison the Hatch Subcommittee's alternative amendment, is for me, a signficantly better proposal.

First, and extremely important, the Hatch amendment by allowing silent prayer and/or meditation only, could not be used to place any religious sect or tradition into a preferred position. Thus this amendment would not violate what, in my judgment, is the historically authenticated concept of church-state separation which the Founding Fathers embraced.

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Third, the Hatch alternative allows for school districts which desire to institute a meditation moment, the constitutional authority to do so. Such moments of prayer and/or meditation are now unconstitutional in at least one state of the Union[11] irrespective of the intentions and actions of the Framers of the First Amendment. Restoring the choice of instituting such a practice or not, to elected political officials puts the basic decisionmaking authority back where it belongs, in the political rather than the judicial process.

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Thank you Mr. Chairman and members of the committee and staff for inviting me to take part in these proceedings.

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[9] *Brandon* v. *Bd. of Education*, 635 F. 2d 971 (1980), cert. denied at 454 U.S. 1123 (1981).

[10] *L.C.L.U.* v. *Lubbock Independent School District*, 680 F. 2d 424 (1982).

[11] *May* v. *Cooperman*, F. Supp. (1983).

The **Chairman**. Thank you very much, Professor Cord. We are very pleased to have you with us.

Professor **Dellinger**. Would you like me to speak before you ask each of us questions, Mr. Chairman?

The **Chairman**. Well, Professor Dellinger, I was thinking this. We have so many witnesses here today—would it suit you all if we gave you some questions to answer for the record?

Professor **Dellinger**. That would be fine, Senator.

The **Chairman**. Otherwise, I do not believe we will get through. If all the witnesses can make their statements as brief as they can, we will put the entire statement in the record, and then we will give you some questions to answer. So, you may proceed now.

STATEMENT OF WALTER E. DELLINGER

Professor **Dellinger**. Mr. Chairman, my statement is not a formally prepared statement. I would like to directly confront the statements made by the Deputy Attorney General, which I think go to the heart of the matter which is before this committee. I think that once again spokesmen for the administration have evaded addressing the central issue under the administration's proposal, Senate Joint Resolution 73.

I would like to commend the subcommittee for its wisdom in offering a substitute for what I think is the extremely dangerous amendment proposed by President Reagan and defended again today by Deputy Attorney General Schmults.

The substitute proposed by the committee states two propositions, a moment for silent prayer, and equal access, that I think are not fundamentally inconsistent with the Supreme Court decisions or with our tradition of religious liberty. But the administration's proposal, Senate Joint Resolution 73—which I am sorry to hear is still not dead, but is yet still before this committee along with the subcommittee's more moderate proposal—Senate Joint Resolution 73 has a central vice which the Deputy Attorney General successfully avoids discussing, and that vice is this: It opens the way to Government control of religion. The administration avoids whenever possible discussing the critical question of who will be empowered to compose those prayers for oral group recitation in the public schools.

Their amendment, by providing that, "Nothing in the Constitution shall prohibit group prayer in public schools" simply creates a black hole in the first amendment. The Department of Justice, by skirting the question of who is going to compose those prayers, wants to deflect your attention from the fact that government officials, politicians, and bureaucrats would be free, if that amendment were adopted, to compose and select the prayers and install the government's selected prayer in every classroom in the State.

When that amendment was proposed by President Reagan in May of last year, the White House's official statement, issued on May 6, 1982, contains this question and answer: "Will state governments be free to compose their own prayers if this amendment is ratified?" The answer: "Yes." Page 117 of the record of last year's hearing, on White House stationery.

There is simply no question, Senator, that government officials on school boards, government officials at State boards of education, government officials sitting in State legislatures will be able to sit down and compose the official prayers that are to be utilized in every classroom if the administration's amendment is proposed.

My colleague, William Van Alstein, and I wrote on the Op-Ed page of the Washington Post that there is an even more serious prospect, that if Senate Joint Resolution 73 is adopted as a part of the Constitution, there would be nothing left in the Constitution that would prevent Federal bureaucrats in the Department of Education from conditioning Federal funding in all 38,000 school districts in this country on the adoption by those districts of the religious prayer guidelines issued by the Department of Education. We challenge the administration to show why this would not be the case. What would be left in the first amendment, if Senate Joint Resolution 73 were passed, that would then prevent Federal bureaucrats from using the power they already have over conditioning Federal fundings from adopting Federal school prayer guidelines? They had no answer then; they have not answered since; they have not answered that question today.

When you asked the Deputy Attorney General the very pertinent question this morning, at what level of government would the determination of the proper prayer be made, he said, "Oh, we expect the determination to be made by local people, maybe even each classroom," period. But that determination can be clearly overruled, as can all other affairs in the school districts, by the school board, by the State board, by the State legislature, by whoever would otherwise have authority to set the rules.

One thing now prevents State government officials and bureaucrats and Federal officials and bureaucrats from prescribing their preferred official religious guidelines, and that one thing is the first amendment's ban on government-sanctioned prayers in the public schools, a ban they would explicitly attempt to overturn.

The subcommittee proposal which you and Senator Hatch and Senator Grassley have endorsed—you, perhaps, in the alternative, along with the President's proposal—avoids that central vice, since it provides for a moment of silent prayer or meditation. It does not say what prayer will be said or whether a prayer will be said. It leaves that to each individual child. That avoids the problem of government control of the prayer itself. It does not give a constitutional carte blanche to government officials, as does the Reagan proposal.

The second portion of the provision of the committee substitute on equal access, I think, also states a sound constitutional principle. It is indeed with some reluctance, given how preferable the committee substitute is, it is with some reluctance that I would urge you not to report either of these amendments to the floor.

The two provisions in the committee substitute, which I will refer to as the "moment of silence/equal access" amendment, generally represent present law, or the law that I fully expect the Supreme Court to adopt. I think we have a problem here in this country that has been caused by loose statements by politicians and administration officials who have been telling the American people that the Supreme Court expelled God from public schools. That is what the President said in May. That simply is not true. There are three Supreme Court decisions on point. They do not preclude prayer in the public schools. They do not preclude an individual student from quietly saying a prayer. They do not preclude a State or a school board from adopting a pure moment for silent meditation.

It is said by the Deputy Attorney General that there are "lots of lower court decisions" holding that silent prayer is impermissible. I beg to differ. On my count, there are now three lower Federal court decisions which hold moment-of-silence statutes unconstitutional, and a fourth issuance of a temporary restraining order in New Jersey. There are also three lower court decisions sustaining moments of silence—one by the New Hampshire court, one by the New Jersey State court, one by the Federal district court in Massachusetts.

The overwhelming sentiment, the overwhelming opinion, of those who have studied this constitutional issue, however, among scholars, is that a moment of silence would be sustained by the U.S. Supreme Court. It therefore seems to me clearly premature to adopt this amendment.

Let me, if I may, indicate those who have consistently maintained that silent prayer is permissible in the public schools. As soon as the *Engel* decision came down in 1963, four of the most distinguished scholars responded directly to this question. Paul Kouper said of course the *Engel* decision does not outlaw prayer in the public schools. Pupils and teachers are free to engage in silent prayer, and it is consistent with the decision to permit a period for silent prayer.

Dean Fordham of the Pennsylvania Law School said of course provision for a regular, brief period of silence would be permissible under the Supreme Court's decision.

I will not detail their statements, except to note to you that others who agree are Dean Jesse Choper of Berkeley, Prof. Paul Freund of Harvard, Prof. Lawrence Tribe of Harvard, who flatly states in his treatist that "a statute requiring observance of a brief period of silence or meditation at the opening of the school day would not violate the establishment clause." In hearings before the subcommittee, Dean Sandlow of Michigan, Professor Bender of Pennsylvania, who will speak to you shortly, Professor Stone of Chicago, all reached the same conclusion. As Professor Stone put it, "The decisions in *Engel* and *Schempp* exclude neither religion nor prayer from the public schools. What they prohibit is officially sanctioned religious activity."

The second part of the subcommittee substitute on equal access states a position that I am confident the Supreme Court of the United States will adopt at the appropriate time. The Supreme Court has decided in the case of *Widmar* v. *Vincent* that the principle of the first amendment's free speech clause provides for equal access to public facilities, including university classrooms. In the case of *Bender* v. *Williamsport Area School District,* the chief judge for the middle district of Pennsylvania clearly upheld the right of public high school religious groups to have access to school facilities on the same basis as other groups. This is a decision which is so soundly reasoned that I am confident it will be sustained by the U.S. Supreme Court on appeal.

The result is that while the administration's proposal is deeply pernicious, the subcommittee substitute is simply unnecessary. If it is unnecessary but will clarify the situation, why not adopt it? I think there is a very good reason for not proposing an unnecessary constitutional amendment in this area.

During the ratification debate over the equal rights amendment, we learned how much it is we do not know about the ratification process. We do not know whether States can rescind a ratification. We have no definitive answer to whether Congress can extend the time for ratification. Proposing amendments at this time is a very troublesome and very costly process. What this committee proposes to do is to send to 50 State capitals for a period of 7 to 10 years two potentially divisive amendments, one would be pernicious, and one that is unnecessary, which are likely to heighten religious tensions in this country. From Montpelier to Sacramento, from Tallahassee to Juneau, you are inviting proceedings that set Jew against Gentile, that put the Knights of Columbus in conflict with the United Presbyterian Church. For 7 to 10 years, we will have a struggle among religious groups over whether to adopt an amendment.

This is a time in our country when many religious minorities feel that there is great stress on religious liberty. To propose either amendment would add to that stress.

To summarize my views on the two amendments, I find it extraordinary that anyone who is serious about religion could support Senate Joint Resolution 73, the Reagan administration's proposal, that would lead to meddling by government officials and bureaucrats in determining the proper, official, governmentally sanctioned prayer. And I find it unpersuasive to think that we need a constitutional amendment to deal with issues that have not yet come before the Supreme Court concerning a moment of reflective silence and equal access to school facilities, when the amendment process itself can cause such strife and such turmoil in 50 State legislatures as this process is undertaken.

Thank you, Senator.

The **CHAIRMAN**. As I understand your position, you are strongly opposed to the President's proposal on the grounds that it is very dangerous, and as to the alternative, you feel that they can do that now without a constitutional amendment; is that correct?

Professor **DELLINGER**. I think that is what the Supreme Court will hold, Senator. I have no doubt that a period of pure silence, a school board that adopted a policy that said that there will be a moment of reflective silence observed at the beginning of each school day, would clearly pass constitutional muster.

Now it seems to me if you have a mere moment of silence, that has got to be constitutional. I have a friend whose second grade daughter in California was in a classroom where the teacher said, "We will now have a moment of silence." She raised her hand at the age of 7 and said, "Miss Johnson, is it all right if I think about my dog?" The teacher said that would be fine.

Now, that is not a coercive situation. If you add the word "prayer," or specifically suggest prayer in the school board policy, as one of the alternatives, and if one is litmus paper-sensitive to establishment violations, I think you would have to find there a trace element of establishmentism, if the Government is specifically suggesting that one of the things you might do with your time is utilize it for prayer. I would therefore find it preferable that any moment of silence be designated simply as a moment of reflection—period, and let each individual child choose how to use that time. Their parents can suggest that they use it for prayer; their ministers, their rabbis can suggest that they use it for prayer—or, if they wish, they may reflect on nonreligious matters.

But whether or not the word "prayer" appears in a moment of silence provision, I think the Supreme Court would sustain such a policy. Justice Brennan so suggested in his concurring opinion in *Abington Township* v. *Schempp.*

The CHAIRMAN. Now, under the President's proposal, as I understand, you feel concerned that maybe the authorities would write the prayer.

Professor DELLINGER. That is correct.

The CHAIRMAN. Do you have a suggestion that would remedy your objection?

Professor DELLINGER. The administration deals with that problem by ignoring it and wishing that it would go away. Other more, responsible persons have suggested some modification of the President's proposal to forbid government officials from participating in the prayer selection process.

It is hard for me to see how that is going to work. If the Reagan amendment proposal flatly states, as it does, that there is no constitutional barrier to group prayer, someone has to make a decision for a group. It is going to be very hard to get around the fact that the people who make decisions about what groups do in public schools are generally government officials. A teacher is a government official. A principal is a government official. Someone has to make this decision. Now, I do not know why they will not respond to this question. I cannot understand why they have not come forward from the Department of Justice and offered a modification of their own amendment proposal.

The CHAIRMAN. Did you have any suggestion on that point? What would you suggest?

Professor DELLINGER. I would suggest, Senator, that no amendment that eliminates the constitutional barrier to organized group prayer in the public schools can avoid the problem of having a government official determine that prayer.

The CHAIRMAN. I understand. Now, you are opposed to that?

Professor DELLINGER. Yes, sir.

The CHAIRMAN. I understand your position. But now, do you have a suggestion to make that would modify that or remedy that?

Professor DELLINGER. The only suggestion I have is that the committee propose no amendment.

The CHAIRMAN. Well, if they do propose one, what do you suggest?

Professor DELLINGER. Senator, I do not believe that any constitutional amendment is necessary.

The CHAIRMAN. In other words, you do not think it could be modified to stand the test?

Professor DELLINGER. No, I do not think it could be modified in any way to make it acceptable.

The CHAIRMAN. Well, that is what I wanted to know. All right.

Professor Dellinger. Now, I do not find there to be anything untoward or dangerous in the subcommittee substitute.

The Chairman. Professor Cord, let me ask you a question. Do you agree with Professor Dellinger that the subcommittee amendment represents the present law?

Professor Cord. Well, let me divert the question just a little bit to what my colleague from Duke has said. As far as I am concerned, the *Widmar* decision was a 5 to 4 vote——

Professor Dellinger. That is not correct. It was 8 to 1, Robert.

Professor Cord. Excuse me, Mr. Chairman, on that.

Professor Dellinger. Before you hang yourself—I did not want you to go further on that.

Professor Cord. Excuse me. You are absolutely right on that, you are absolutely right on that. Excuse me, Mr. Chairman.

The Chairman. Let me clarify this, now. As I understand Professor Dellinger, he feels that the subcommittee amendment represents present law; is that correct, Professor Dellinger?

Professor Dellinger. There is nothing in the present Supreme Court decisions which is inconsistent with the subcommittee's proposal.

The Chairman. All right. Do you agree with that now, Professor Cord?

Professor Cord. Technically, yes, but Mr. Chairman, I would like to qualify that. In the *Brandon* case, equal access, section 2 of the subcommittee's proposal——

The Chairman I am not speaking of equal access now; I am speaking about the first part.

Professor Cord. The first part. Mr. Chairman, in several States of the Union, because of lower Federal court decisions which are now operative, silent moments of meditation are unconstitutional.

The Chairman. So this amendment would remedy that if it were adopted?

Professor Cord. It certainly would.

The Chairman. And would you favor the alternative that the subcommittee has been considering?

Professor Cord. I favor the subcommittee's amendment or alternative. The administration's amendment, as I indicated, as written, precludes no prayer, Mr. Chairman, and as I tried to make clear in my statement, one of the important ingredients of separation of church and state that the Founding Fathers embraced was no preferential treatment for any sect, religion, or religious tradition.

Therefore, any kind of prayer could be written under the administration's proposed amendment. And if that amendment or that proposal is reported out and becomes an amendment to the Constitution, the first amendment cannot be taken any longer to preclude what I think the framers clearly wanted to preclude: preferential treatment to any one religious tradition, religion or sect which has always been the clear trademark of an established church.

The Chairman. Now, let me ask you this question. So you are opposed to the administration amendment?

Professor Cord. Most definitely.

The Chairman. Now, do you favor doing nothing, or do you favor adopting the amendment that the subcommittee is considering and recommends as an alternative if the President's amendment is not adopted?

Professor CORD. My view is this, that the "equal access"—let me take this the other way around, Senator. The equal access section 2 of the subcommittee's recommendation is crucial if first amendment rights are to be restored, irrespective of what the Supreme Court does, and we cannot predict that.

The CHAIRMAN. Now, that is on equal access?

Professor CORD. That is on equal access.

The CHAIRMAN. You favor that.

Professor CORD. That is right.

The CHAIRMAN. Now, do you favor the first part or the second part?

Professor CORD. The first part—as I said, I have not come down here to advocate a prayer amendment. What I have come down to do is to urge that nothing be passed that violates what the framers thought separation of church and state meant. A silent moment of meditation or prayer, in my judgment, does not violate the historically documented concept of separation of church and state.

The CHAIRMAN. In other words, you feel that the alternative by the subcommittee would meet the standard and would not be objectionable?

Professor CORD. Exactly.

The CHAIRMAN. Thank you.

Professor DELLINGER. I agree with Professor Cord that there are lower court decisions, three in number, and one temporary restraining order invalidating moments of silence. I am not persuaded that the Supreme Court would uphold those decisions.

The CHAIRMAN. I do not want to call your time, but our time is up now, and in fact, I have given you more time than was allotted to you.

Professor CORD. Thank you, Senator.

The CHAIRMAN. We thank you very much, both of you, for your appearance.

Professor DELLINGER. Thank you very much, Senator.

The CHAIRMAN. Our next panel includes Professor Michael Malbin and Professor Paul Bender. We would be glad to hear from you, gentlemen.

Professor Malbin is an adjunct associate professor in politics at Catholic University. He is also a resident fellow at the American Enterprise Institute and the author of "Religion and Politics: The Intentions of the Authors of the First Amendment."

With him will be Prof. Paul Bender, of the University of Pennsylvania Law School, who received his law degree as well as his undergraduate degree from Harvard, and he is a distinguished constitutional scholar.

We would be very pleased to hear from you, and if you could see fit to summarize your statements, we will put your entire statements in the record, if that is agreeable with you. In other words, if you can come down to the "juice in the coconut," so to speak, and give us your opinion here, that is what we want, as briefly as you can.

You may proceed, Professor Malbin.

STATEMENT OF A PANEL, INCLUDING PROF. MICHAEL J. MALBIN, RESIDENT FELLOW, AMERICAN ENTERPRISE INSTITUTE, WASHINGTON, DC, AND ADJUNCT ASSOCIATE PROFESSOR IN POLITICS, CATHOLIC UNIVERSITY, WASHINGTON, DC, AND PROF. PAUL BENDER, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL

Professor MALBIN. Thank you, Mr. Chairman. I should like to start with this caveat: what I say will be based on my own research. I am not here to represent anyone, and AEI does not take any organizational positions on matters of policy.

Let me come right to the point, Mr. Chairman, and Senator, as you requested. You have two amendments before you, the President's and the silent prayer or meditation amendment. I believe the Supreme Court, since 1947, has adopted a rule of law that runs counter to the intentions of the first amendment by prohibiting nondiscriminatory public support for religion. Hence, I believe it is appropriate to amend the Constitution, but only to restore its original meaning. However, like Professor Cord, I believe the President's amendment to be contrary to the principles of 1789, because it would foster discriminatory sectarianism.

Therefore, I think of the silent prayer amendment not merely as a fallback compromise. Given the proper understanding, it is the best expression of the full range of concerns the framers had in mind almost 200 years ago and that we should have in mind today. The silent prayer amendment need not be weak-kneed, as some conservative critics have suggested. It allows public officials to make a clear, unequivocal statement on behalf of returning religion to an honored place in public life, and it allows for deep, meaningful prayers, not the watered-down pablum that comes from publicly written compromises. At the same time, and contrary to its separationist critics, the silent prayer amendment would not establish a religion or even establish religion as such. Students would be free to meditate on whatever they wish. Unlike the situation that must prevail with any vocalized prayer, no student would be pressured to accept or even listen to anything he or she found offensive.

Despite the attacks from both left and right, therefore, I believe that a silent prayer amendment and only a silent prayer amendment, can meet the serious and legitimate concerns—not all the concerns, but the serious and legitimate ones, of those who want prayer, without raising any of the serious and legitimate concerns of those who are on the other side.

Let me now go to a more detailed consideration of the issues. I shall do so in five parts, and as you suggested, I shall summarize them.

The first is on the intentions of 1789; the second is on separationist arguments against silent prayer; the third, on the President's amendment; the fourth, on conservative arguments against silent prayer, and the fifth on whether a silent prayer amendment is necessary or appropriate at this time.

The first part. Mr. Chairman, I know you have asked me to come here primarily because of my published work on this subject. I have already described that research in subcommittee, and I will not take your time reviewing a lot of old ground. But I would like to summarize a few main points.

Speaking very broadly, most contemporary interpretations divide into two camps, both of which I think are wrong. Separationists, following the modern Supreme Court, like to say that the First Congress intended to erect an absolute "wall of separation" between church and state. They cite a private letter written by President Jefferson in 1802, some statements made by Madison in 1784 in Virginia and later while he was President. But Jefferson was not even a member of the First Congress. Madison was the floor manager of the amendments, it is true; but you know from your own experience that statements of a floor manager, made in a completely different context, several years removed, cannot be used as if they represent the result of a collective deliberation. Moreover, these statements do not even fairly represent Madison and Jefferson, as Professor Cord's work has shown.

On the other side, conservative critics like to point to the general public practices in the years just after 1789. They talk about the fact that we have had prayers for many years. If public prayers were generally accepted, they say, how can you read the framers as having intended to ban prayer? This point of view is valid—I concede that—but it does not go far enough. The framers' view may well have accepted some exercise which they did not see or understand as being inconsistent with their principles, but which proved to be inconsistent with the same principles in a religiously more diverse nation.

To resolve the difference, we have to look at the principles that the Members of the First Congress intended to convey, and we do so based on the Annals of Congress.

Madison's original proposal read, "No religion shall be established by law." He interpreted it in his own opening remarks to mean "that Congress should not establish a religion." Note that what he said is Congress should not establish "a" religion, not that Congress should not establish religion as such.

But Madison's interpretation did not match his own original language. That led Members of Congress to express two different concerns on behalf of religion. One, to quote Benjamin Huntington, was "that the words might be taken with such latitude as to be extremely hurtful to the cause of religion." The other was that the amendment did not prevent Congress from passing laws that would threaten the existing establishments in the States.

The final language compromised both issues in favor of religion. Laws touching religion were allowed, but not ones that would have directly curtailed establishments of religion. At the same time, the language prohibited Federal laws that directly favored one religion or group of religions in favor of others. Again, note the phrase, respecting "an" establishment, not "the" establishment.

But the language did not prohibit laws that might tend to assist religion as such. The First Congress did not expect the Bill of Rights to be inconsistent with the Northwest Ordinance of 1787. The same First Congress reenacted the Ordinance in 1789 in the middle of their deliberations about the Bill of Rights. One clause in the ordinance said that schools were to be built on Federal lands with Federal assistance, so they could promote religion as well as morality, and in fact, most schools at the time were church-run, sectarian schools. However, the aid was open to any sect that applied.

In summary, the Members of the First Congress wanted religion to flourish, but they wanted a secular government. They thought a multiplicity of sects would help prevent domination by any one sect, and so help to avoid the religious divisiveness and warfare that they knew, from recent English history. We really should not lose sight of the importance of their concern about divisiveness, as we seek to correct recent misinterpretations.

At the same time as they were concerned about divisiveness, however, most members of the First Congress also thought religion was useful, perhaps even necessary for teaching morality. Most also thought a free Republic needed citizens who had a moral education. They thus tended to view nondiscriminatory aid to religion, as long as it was truly nondiscriminatory, as a policy that was designed not to achieve religious objectives, but as one, to use the current language, "with a secular purpose and effect."

I turn now to the second point, current court doctrine and the separationist arguments against silent prayer. The Supreme Court since 1947 has consistently misstated the framers' intentions, even as they claimed to be relying on them. The Court in 1947 said that neither Congress nor a State may do anything to aid or prefer one religion over another, even in a nondiscriminatory way. The Court thus changed law in two ways, first, by prohibiting nondiscriminatory aid, and second, by applying a no-aid interpretation to the States when the original intention was in part to protect the existing State establishments.

On the Nation-State issue, by the way, if anyone wants to argue that the 14th amendment changed things, that person has to cope with the awkward fact of the Blaine amendment.

The current separationist critics of the silent prayer amendment rely on the Supreme Court "no-aid" and "neutrality" rules to say that a silent prayer or meditation amendment should be prohibited.

"Enforced classroom silence," said the New York Times, in a June 19 editorial, "is hardly less controversial than other prayer amendments that have been kicking around for years."

Nonsense. Vocalized prayer is necessarily and inherently discriminatory. Silent prayer is not. A call for silent prayer would clearly meet the framers' original intentions without requiring anyone to say anything, believe anything, or even listen to anything with which he or she did not agree.

But some say that is not the point. For example, the New Jersey Civil Liberties Union has filed suit against that State's silent prayer or meditation statute, and it says that the problem is that the law openly proclaims its intention that a period of time be set aside each day for prayer. Well, it does, but that is not the whole story. The legislative choice was between a statute that was limited to silent meditation and one that specifically included the word, "prayer."

Yes, adding the word, "prayer," does encourage religion more than leaving the word out. It also serves to encourage everything else that is mentioned in the statute. I find it strange that some of the same groups that oppose--not all, but some of the same groups that oppose periods of silent prayer or meditation support kindergarten classes on nuclear war and junior high school classes on contraception. When challenged, these groups say they are not advocating unilateral disarmament or teenage sex. No student will be coerced or pressured, they say; they just want youngsters to make an informed choice. Well, precisely so. I do not oppose sex education. I believe in informed choice. Nothing more is involved in the silent prayer amendment.

Part three. I now turn to the President's amendment, which would permit vocal, group, voluntary prayer in the classroom. My problem is there is no such as a nondiscriminatory vocal prayer. Even a nondescript prayer thanking God for the food we eat invokes a being not at all consistent with the supreme powers accepted by those Americans who happen to be Buddhists, or Hindus, or members of one of the other large Eastern religions, or even many contemporary Unitarians.

The narrow holdings in *Engel* and *Abington*, therefore, in my view, were both correct. It is their broad rules of law and subsequent applications that cause difficulties.

What sort of prayer might be offered under the President's amendment? It seems to me there are only three possibilities: one written by the State, one chosen by the State from sectarian liturgy, or one offered voluntarily by a student. Each has a problem. A State-authorized prayer is bound to be pablum for some, while discriminating against others. Having the State choose a sectarian prayer or reading would increase its meaning for some, but also increase the discrimination against others. Having students take turns reading their own prayers would not change the discrimination. It would only change its source and predictability. But how could anyone be offended, it might be argued—and the Deputy Attorney General argued today—if participation is voluntary? What is offensive about vocal prayer or the use of visual religious symbols, artifacts, or gestures is not that they force minorities to participate, but that they inevitably stamp a discriminatory State imprimatur in favor of the religions that may be dominant in any local community.

On the other point, however, I do not believe the situation would be simply voluntary. It might be for adults, for example, when the chaplain reads before the Senate, but it is not for children.

Children may opt out, yes, or forcefully proclaim that they are different, but only at the cost of facing up to peer pressure and ridicule. The problem of peer pressure and ridicule, which has been belittled by some, in my opinion gets at the heart of what is wrong with the President's amendment. The purpose of the first amendment was to support an environment in which religion was honored, but in which the passions that produce civil strife were damped down. The President's amendment would honor religion, but it would also inflame the religious passions in every school district in the country by turning the content of prayer into a political football.

The dangers this might entail make me strongly prefer the status quo to vocal prayer if that were the only choice. It is not, however, as we have indicated.

I think at least part of the public senses the same danger that I am indicating. The supporters of the President's amendment like to cite polls that show 75 to 80 percent of the public favors a restoration of prayer in the public schools But when the questions are phrased more specifically to include words like "organized group prayers" or "organized vocal prayers," the support drops to the low to midsixties. Yes, that is still a majority, but it is not the kind of overwhelming consensus that is usually associated with an amendment, and I think the 10 to 15 percent who shift with the question's wording are trying to tell us something that is worth hearing.

Part Four. Some supporters of the President's amendment have opposed silent prayer because they believe vocal prayer would be more meaningful. I believe the reverse is true. Vocal prayer, as I said, must either be pablum or meaningful. If it is pablum, who needs it? If it is meaningful, some will be left out. To those who say there is no harm in being left out, and learning about someone else's religion, and taking a turn on another day, I say this confuses the purpose of having an amendment. The idea is to restore prayer, not to run classes in toleration or comparative religion. Comparative religion is permitted now. The aim should be, and I understand the aim of the amendment to be, to set time aside for prayer or meditation for every student every day, not to listen 4 days and pray 1.

Silent prayer is an important part of almost every religion. In my own Jewish religion, the lengthy Amidah, or silent prayer, comes in the middle of every service, at least three times a day. Similarly, many candidates with whom I have traveled stop several times a day, wherever they are, for silent devotion. These periods of silence are times set aside for intense personal communion with God. Their content, and their beauty makes the watered-down lip service of public recitation seem pale by comparison.

What about those students who do not know how to pray on their own, it may be asked? Well, I answer first that it is not the public schools' job to teach them. I would also say that students will have a chance for more meaningful religious leadership with silent than with vocal prayer. Every Sunday school could hold discussions on daily prayers for the coming week. There is no way the clergy could play anything approaching such a role with vocal prayer.

Finally, what about those who say, as some evangelicals have said to me, that they have a religious obligation to proclaim the name of Christ aloud, which silent prayer does not satisfy? To them, I say fine, but not in a classroom. Vocal and silent prayer in most faiths serve different religious purposes. Silent prayer is personal; it is for personal communion with God. Vocal prayer, on the other hand, is communal or group prayer. The public school is not a religious community, and it should not be. As a political community, we must be open to those who disagree on matters of faith; that is a bedrock principle of the constitutional regime.

Finally, what about whether the amendment is necessary? Some argue that it is not because the Supreme Court has never ruled on the issue.

I think the neutrality rule is and should be consistent with silent prayer or meditation. However, many lower courts disagree, and who knows what the Supreme Court might say, or if it would say anything at all?

The subcommittee amendment does not represent present law. The lower court rulings on silent prayer have not been as favorable as some previous witnesses have said. As Professor Dellinger said, adding the word "prayer" is the issue. The score now, if I am not mistaken, is one 17-year-decision in favor, and four against. The other decisions that are counted in favor usually involve silent meditation statutes that do not mention the word "prayer," and the against rulings are much more recent.

We also know that there are 18 States with silent prayer or meditation statutes, but very few school boards have implemented them. I cannot help but believe that this is partly because of the way the school boards themselves read the Court's doctrine, and partly because of the pressures being placed on them by local civil liberties organizations.

As long as this situation exists, people who want some kind of silent prayer or meditation exercise are being denied an opportunity that they should have. It is perfectly appropriate for this body to affirm a right whose exercise is being chilled in large part by the courts. At the same time, it is appropriate for this body to declare loudly that one can honor and reserve a place for religion without establishing a religion. Yes; you could wait for the unpredictable Supreme Court, but you might have to wait for a lifetime.

The CHAIRMAN. I would like to ask this question. As I understand, you are opposed to the President's proposal.

Professor MALBIN. Yes.

The CHAIRMAN. Are you opposed to the alternative that the subcommittee is considering, along with the President's proposal?

Professor MALBIN. No.

The CHAIRMAN. Thank you.

Professor MALBIN. By the way, there are one or two technical things you might want to do to answer some points that the Deputy Attorney General raised. He said something about the subcommittee amendment raising problems for commencement exercises, for invocations or the use of chaplains I am sure that is not the intention. I do not read it that way. I think you can take care of that by amending the second sentence to run parallel to the first, so that both sentences include the words "in public education," rather than having "in public schools" in the first and nothing in the second. I think that technical change would take care of the argument that the Deputy Attorney General made.

The CHAIRMAN. Thank you very much.

Professor Bender, we will be very pleased to hear from you now.

STATEMENT OF PROF. PAUL BENDER

Professor BENDER. Mr. Chairman, thank you very much.

I do not have a written statement. I am afraid that I was asked to come down here just a few days ago and did not have time to prepare one. I will try to be very brief.

I testified before the subcommittee earlier on the President's proposal, Senate Joint Resolution 73. My views then were, and they still are, that that is an unwise proposal, for two basic reasons. First, there is no provision in that proposal that would limit in any way the kind of prayer that could be officially adopted. You could have the most narrowly sectarian or denominational prayer adopted by a school district, a particular school or a State under the President's proposal. I think that it is just a terrible idea to permit extremely narrow sectarian prayer in the public schools. Even if you disagree, as I do not, but even if you disagree with the Supreme Court's decisions in *Engel* and *Abington*, those cases dealt with the Lord's Prayer and similarly widely recognized and relatively nonsectarian prayers. To adopt a constitutional amendment that would permit a school, a school district, a school board, or a State or city to adopt very narrow sectarian prayers, is offensive to all of our constitutional traditions.

The second reason for my disagreement with Senate Joint Resolution 73 has been mentioned earlier today. That reason comes under the heading of what the Supreme Court has referred to in its cases as excessive "entanglement" between government and religion. If we were to amend the Constitution to permit schools, school districts, or localities or States to adopt official prayers, imagine the kind of political debate that would go on with regard to the particular prayer to be adopted. It is difficult to imagine any more inappropriate entanglement between government and religion than would take place in those debates.

So I think the President's proposal, Senate Joint Resolution 73, is a very unwise one, and I oppose it.

The Hatch proposal, Senate Joint Resolution "blank", which would deal with silent prayer and equal access, does not incorporate the evils that I see in Senate Joint Resolution 73. Nevertheless, I will give you my views now as to why I do not think you ought to recommend that proposal either.

With regard to the first section of Senate Joint Resolution "blank," having to do with silent prayer, I am not sure at the outset what that section means. Basically, if it means one of the things that I think it might mean, I am opposed to it; if it has a different meaning, I think it is unnecessary. Let me talk about the first possible meaning first.

When Senate Joint Resolution "blank" states that "Nothing in this Constitution shall be construed to prohibit individual or group silent prayer," I ask myself what "group silent prayer" means. How can people silently pray as a group? The only way I can imagine for that to be done is if a period were set aside only for prayer, that is, if a school day were to start by the teacher saying, "Now, children, in the next minute"—or 2, or 5—"we shall all silently pray." That, I think might be described as "group silent prayer." If that is what is intended by this proposal, I think that the proposal is unwise, because it tells the children that they are expected to pray. As I think we all recognize, some children may properly choose not to do that; in all events it should not be official policy that children pray. The matter should be left to individual choice.

So if that is what it means, I think it is a poor idea. On the other hand, it might mean, and I hope it means, not that a moment shall be set aside only for prayer, but that a moment of silence may be set aside for either meditation or prayer or any other thing that the children want to do with that silent time. If that is what it means, I do not oppose it at all, but I think it is completely unnecessary to have a constitutional amendment on the subject. I know of no reason to expect that the Supreme Court of the United States, when the question finally comes to it, would hold that kind of silent period to be unconstitutional A moment of silence set aside at the beginning, at the middle, at the end of a school day, for children to think, pray, do whatever else they wish, so long as it is in silence, does not seem to me likely to be held to violate the establishment clause, as long as it is made clear that the choice is the children's, and that prayer is just one of many silent things that are permitted to be done during that time

It seems to me that is all anyone should want if what you want is an opportunity for silent prayer. You do not want to say to the child, "You must pray now," because, as we said before, a child may not want to, and he has no obligation to do that, and it should not be governmental policy to require prayer. And if you simply say, "This is a moment of silence where you may pray if you wish," it seems to me that it has always been understood that a child in school, or a teacher in school, may silently pray at any time during the school day. I imagine, in fact that lots of children silently pray in school at the beginning of examinations—even in the middle of examinations—or before being called upon to recite. There is nothing unconstitutional about that, and I do not believe there is any need to have a constitutional amendment to deal with the matter. And given the length and divisiveness of the constitutional amendment process, it seems to me that that is just another reason why you should not propose an amendment unless it is absolutely necessary to do so.

I have basically the same view about the second part of Senate Joint Resolution "blank," section 2, dealing with equal access. This is an issue which the Supreme Court confronted for the first time, about 2 years ago, in the *Widmar* case. As you know, in that case, the Court held that in the university setting, the first amendment required that when public facilities were made available to voluntary student groups generally, they had also to be made available to religious groups, even for prayer purposes.

The Supreme Court has not yet said whether that decision applies in the secondary and elementary school setting as well. There are some reasons why it might be argued that it does not. Indeed, the Supreme Court in Widmar referred to at least one factor that might lead to a distinction between universities and elementary schools, namely, the impressionable nature of younger children and the fact that if voluntary groups were permitted to pray on school premises, some younger children might think in some circumstances that that showed official school approval or official school backing of a particular religious group or prayer.

But it seems to me quite possible that a voluntary "equal access" policy, even in elementary schools, could be administered in a way that would largely or completely negate any impression that would be given to the children that this was some kind of an official prayer or religion.

Until the Supreme Court decides that that cannot be done, and while it still seems that it is at least possible that the Supreme Court will decide that some kind of voluntary, "equal access" policy is constitutional, when hedged in with safeguards against giving the impression that the prayer is official prayer, it seems to me unwise to propose a potentially devisive constitutional amendment to deal with a constitutional problem that may well be nonexistent.

So, to summarize, I oppose Senate Joint Resolution 73. I think that proposal is a terrible idea, because: No. 1, it would permit very narrow denominational and sectarian official prayers, and No. 2, it would get governmental units involved in deciding what prayer to adopt, which would be a very serious kind of inappropriate entanglement between religion and government.

And as to Senate Joint Resolution "blank," if the first section means a moment of silence only for prayer, I oppose that as a bad idea. If it means a moment of silence for prayer or other things, I do not see any objection to that, but I do not think a constitutional amendment is necessary to permit that. I think that can be done today.

And the second section of Senate Joint Resolution "blank," the "equal access" section, I also think unnecessary because, so far as we now know, the Supreme Court is quite sensitive to those "equal access" problems. In my view, the Court should be given a chance to work those problems out before we try to tinker with the Constitution.

Thank you very much.

The CHAIRMAN. Thank you very much.

As I understand it, you are opposed to the President's recommendation.

Professor BENDER. Correct.

The CHAIRMAN. And as to the subcommittee's alternate which is being considered, you think it may not be necessary, but you do not especially oppose it. Is that right?

Professor BENDER. Well, if it means to authorize a moment of silence only for prayer, I oppose it. If it means to authorize a moment of silence during which the children may, if they wish, pray or meditate in other ways, then I do not oppose it, but I think it is unnecessary to amend the Constitution to achieve that result.

The CHAIRMAN. All right. Thank you very much. We appreciate both of you appearing here today.

We do have another panel at this time, including, first, the Baptist Joint Committee on Public Affairs; the Lutheran Council, U.S.A,; the National Council of Churches, and the American Jewish Congress.

If you gentlemen would please introduce yourselves, in the order of each group that I called.

STATEMENT OF A PANEL, INCLUDING JOHN W. BAKER, GENERAL COUNSEL, BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS; REV. CHARLES V. BERGSTROM, EXECUTIVE DIRECTOR, OFFICE FOR GOVERNMENTAL AFFAIRS, LUTHERAN COUNCIL, U.S.A.; REV. DEAN M. KELLEY, DIRECTOR FOR RELIGIOUS AND CIVIL LIBERTY, NATIONAL COUNCIL OF CHURCHES OF CHRIST OF THE U.S.A.; AND JOEL H. LEVY, AMERICAN JEWISH CONGRESS

Mr. BAKER. I am John W. Baker, the general counsel for the Baptist Joint Committee on Public Affairs.

Reverend BERGSTROM. Charles Bergstrom, Lutheran Council, U.S.A.

Reverend KELLEY. Dean Kelley, with the National Council of Churches.

Mr. LEVY. Joel H. Levy, the American Jewish Congress.

The CHAIRMAN. Thank you. We will just take you in the order in which I called them, if that is agreeable.

We wish to welcome you gentlemen here, and you may proceed now. The light will come on when you start. The yellow light means you have 1 minute, and the red light means your time is up.

Mr. BAKER. Thank you, Mr. Chairman. I have filed with the committee a full statement, and I will not attempt to read the entire thing. In fact——

The CHAIRMAN. The entire statement will go in the record, and you may express yourself as you see fit.

STATEMENT OF JOHN W. BAKER

Mr. BAKER. Thank you.

I am the general counsel for the Baptist Joint Committee, which represents, or is the Washington office, for the eight major Baptist denominations, black and white, in this country, with a total membership of nearly 30 million, but because of the congregational nature of the Baptist Church, which you are well aware of, we do not purport to speak for any particular Baptist or for every Baptist at all.

However, I do want to point out to the committee that last week, I think it was—time gets by me—in Pittsburgh, the Southern Baptist Convention went back to its traditional position in opposition to any change to the first amendment, and in opposition to this sort of a thing that is involved both in Senate Joint Resolution 73 and House Joint Resolution "blank." The American Baptists did the same thing 1 day later.

Generally, this is the kind of thing that Baptists believe. They believe in separation of church and state, and they do not believe in government involvement in religion or in the religious process.

We have objected over the years to amendments similar to Senate Joint Resolution 73, and because we have been so consistently against that, we have not included any testimony of this sort in our statement today. However, we are addressing what is now called Senate Joint Resolution "blank." And I have several reasons why we do object to this and are opposed to it. First of all, in the best of our traditions, we are opposed to amending the first amendment. It is ironical, it seems to me, that such a very personal, private and exclusively religious part of an individual's life—that is, prayer—should be a subject matter of the only serious congressional attempts to modify the religion clauses of the first amendment. The Supreme Court did not, as has been pointed out, in fact, could not eliminate truly voluntary prayer from the public schools. Neither a prayer amendment, which in effect provides for government-prescribed, so-called voluntary prayers, nor a required or permitted period of silence is necessary for truly voluntary prayer to take place. The first amendment is as it is an adequate and sufficient guarantor of the truly voluntary religious activity.

Secondly, we have objected to these proposals because we feel that amending the Constitution should be the very last resort, rather than the first resort. The Constitution has stood as a fundamental law for nearly two centuries, and to assume that every perceived wrong or suspect application of our fundamental law must be corrected by an amendment to the Constitution is to be untrue to our heritage as Americans.

Only after all—and I emphasize all—other methods for the redress of grievances have been exhausted, should any consideration be given to adding new ideas and particularly, new words that have been untested and uninterpreted to the Constitution.

Third, neither the judicial nor the legislative processes have run their full course on a period of silence or on equal access. You have this pointed out to you already, that there are cases in the pipeline that the Court is going to consider or will consider, and I think you have not exhausted those opportunities. Courts are uniquely competent to differentiate fact patterns and to render case-by-case decisions in complicated and emotion-laden cases. It is the better part of wisdom, in my opinion, to give the courts a full opportunity to decide the cases that are there.

Also, I think the legislative body has some things that they need to say. Mr. Hatfield spoke today on his equal access bill, S. 815. It has not been given a full hearing, and it merits such hearing. We would find his provision much less threatening to religious liberty than that proposed by this amendment.

So I close where I came in. We are unalterably opposed to tampering with the first amendment. The amendment has indeed proven to be adequate and sufficient to protect religious liberty in the past, and it is our contention that if it is left alone, it will continue to be adequate and sufficient for the years to come.

Thank you.

[The following was received for the record:]

PREPARED STATEMENT OF JOHN W. BAKER

I am John W. Baker, General Counsel for the Baptist Joint Committee on Public Affairs.

The Baptist Joint Committee on Public Affairs is composed of representatives from eight national cooperating Baptist conventions and conferences in the United States. They are: The American Baptist Churches in the U.S.A.; Baptist General Conference; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Seventh Day Baptist General Conference; and Southern Baptist Convention. These groups have a current membership of nearly 30 million.

Through a concerted witness in public affairs, the Baptist Joint Committee seeks to give corporate and visible expression to the voluntariness of religious faith, the free exercise of religion, the interdependence of religious liberty with all human rights, and the relevance of Christian concerns to the life of the nation. Because of the congregational autonomy of individual Baptist churches, we do not purport to speak for all Baptists.

On June 16, 1983 the Southern Baptist Convention, meeting in Pittsburgh, Pennsylvania, adopted a resolution which, after praising the First Amendment provisions preventing an establishment of religion and guaranteeing the free exercise of religion, concluded: "Be it finally RESOLVED, That we call upon Baptists to express their confidence in the United States Constitution, and particularly the First Amendment, as adequate and sufficient guarantees to protect these freedoms." One day later, on June 17, 1983, The American Baptist Churches in the U.S.A., meeting in Cleveland, Ohio, adopted a resolution on religious liberty which in part stated: "We also reaffirm the principle of Separation of Church and State as a legal guarantee and a source of support for religious liberty."

These attitudes about the First Amendment guarantees are typical of most Baptists and it is from this starting point that the Baptist Joint Committee will present its testimony today.

1. **We strongly object to any attempt to amend the First Amendment.** Because the First Amendment has been extensively litigated during the past 40 years, there is some understanding of its scope and meaning. There is an orderliness and a regularity about it which has allowed both church and state to know generally the proper relationship between the two. Both the church and the state have profited by knowing the metes and bounds of their relationship. Religious liberty has been adequately and sufficiently protected by the First Amendment as it is today.

We object to any effort to tamper with or alter the First Amendment. It is ironical that such a very personal, private and exclusively religious part of an individual's life -- prayer -- should be the subject matter of the only serious congressional attempts to modify the religion clauses of the First Amendment. The Supreme Court did not -- and, in fact, could not -- eliminate truly voluntary prayer from the public schools or anywhere else. Neither a prayer amendment which, in effect, provides for government-prescribed, so-called "voluntary" prayers nor a required or permitted period of silence is necessary for truly voluntary prayer to take place. The First Amendment, as it is, is an adequate and sufficient guarantor of all truly voluntary religious activity.

2. **Amending the Constitution should be the last resort rather than a first resort.** The Constitution has stood as a fundamental law for nearly two centuries. It has stood the test of time with relatively few amendments beyond the Bill of Rights. To assume that every perceived wrong or suspect application of our fundamental law must be corrected by an amendment to the Constitution is to be untrue to our heritage as

Americans. Only after _all_ other methods for the redress of grievances have been exhausted should any consideration be given to adding new ideas and new and untested and uninterpreted words to the Constitution.

3. Neither the judicial nor the legislative processes have run their full course on the issues of a period of silence or equal access. The Constitution as it is today embodies ideas and concepts which are not antagonistic toward either of the concepts this proposed amendment addresses. If the judicial processes as well as the ordinary legislative processes are allowed to run their course, the need which some Senators see for a constitutional amendment may well be removed.

For example, there are conflicting decisions in the Federal District Courts about the constitutionality of a period of silence for prayer or meditation in public schools. A three-judge panel upheld a Massachusetts law which provided for a period of silence. _Gaines_ v. _Anderson_, 421 F.Supp. 337 (D.Mass. 1976). Similar laws have been struck down recently. _See_, _Beck_ v. _McElrath_, ____ F.Supp. ____(M.D.Tenn. 1982) and _Duffy_ v._Las Cruces Public Schools_, 557 F.Supp. 1013 (D.N.M. 1983). Another "period of silence" case is now pending in the Federal District Court in New Jersey. It is just a matter of time until this issue reaches the Supreme Court and a final determination can be reached on the merits of the case and on the meaning of the First Amendment.

Also, only last month a Federal District Court in Pennsylvania handed down a decision in a "clean" case supporting the right of a voluntary student religious group to equal access to the use of school facilities when a limited public forum had been created. _Bender, et al._ v. _Williamsport Area School District, et al._, ____ F.Supp. ____(M.D.Pa. 1983). Notice of appeal has been filed.

Courts are uniquely competent to differentiate fact patterns and to render case-by-case decisions in complicated and emotion-laden cases. It is the better part of wisdom to give the courts a full opportunity to decide cases such as these rather than to rush to change the basic rules before the courts are able to sort out the problems. It has only been a comparatively short time since the Supreme Court handed down its prayer and Bible reading decisions. At the outside it should take only two years for the cases mentioned above to reach the Court. This nation will be better served by patient waiting on the Court than by an amendment to the Constitution which will require many additional years of litigation to clarify its meaning and delineate its impact.

A legislative body in its lawmaking function is uniquely competent to act on social issues. Since every word added to the Constitution alters the fundamental law of the land, an amendment must be terse; but a legislative act states its purpose, defines terms used, and qualifies its meanings so that the intent of Congress usually is clear. The "equal access" portion of this proposed amendment is a classic example of the danger of using a few words to achieve a specific end. If the amendment is adopted, the first time a totally undesirable student group demands access the school administrator -- who must allow equal access to all voluntary student groups -- will have to opt for no access to any group. Moreover, an amendment may have far-reaching effects, many of which are unforeseeable; legislation does not suffer as greatly from this defect and is much more easily changed when a mistake has been made.

The Congress has not yet exhausted its legislative options. Senator Hatfield's proposal on equal access, S. 815, has not been given a hearing. It merits hearings and we would find its provisions much less threatening to religious liberty than this proposed amendment. S. 815 is more narrowly drafted and contains more qualifying words than does this proposed amendment, and thus it is less likely to force drastic decisions by school administrators or engender unforeseen judicial interpretation. In any event, we would much prefer an attempt at a legislative solution to the problem of religion in the public school classroom to any change in the First Amendment.

Thus we end where we began. We unalterably oppose any tampering with the First Amendment. That Amendment indeed has proven to be "adequate and sufficient" to protect religious liberty in the past and it is our contention that, if it is left alone, it will continue to be "adequate and sufficient" for the years to come.

The CHAIRMAN. Thank you, Mr. Baker. Let me ask you this question. Do you represent the Southern Baptists, too?

Mr. BAKER. Yes. They are a part of the Baptist Joint Committee on Public Affairs.

The CHAIRMAN. Here is a letter that came on June 27, 1983, to me. It says, "As chairman of the Southern Baptist Convention's Public Affairs Committee, I am pleased to submit for the record a copy of a resolution supporting President Reagan's proposed constitutional amendment to permit voluntary school prayer, which was adopted by the Convention in June 1982," and so on.

Mr. BAKER. Yes, they did, and that is one thing I was talking about, Senator. In 1982 in New Orleans, the Southern Baptist Convention did adopt a resolution approving the President's proposal. But in Pittsburgh, on the 16th, I think it was, of this month, they adopted another resolution, which I have in my hand which, among other things, ends up: "Be it finally resolved that we call upon Baptists to express their confidence in the U.S. Constitution and particularly in the first amendment, as adequate and sufficient guarantees to protect these freedoms." They rejected what they had said the year before, and as you know, Baptists do change their minds

The CHAIRMAN. Well, now, did that reject what they said the year before?

Mr. BAKER. Yes, it did. They came out talking about free exercise and about the rights of citizens, as well as in favor of no establishment, and——

The CHAIRMAN. Well, I wonder just why they sent this letter, then, on June 27.

Mr. BAKER. Well, I know who sent the letter, and——

The CHAIRMAN. Samuel T. Currin, chairman of the Public Affairs Committee.

Mr. BAKER. Yes. That is an old resolution which agreed with Mr. Currin's position. It is not the position which the Southern Baptist convention took just 2 weeks ago.

The CHAIRMAN. You construe what they did this year as reversing what they did in 1982?

Mr. BAKER. Well, as you know, Southern Baptists——

The CHAIRMAN. Now, what you just said, is that clear, that reverses the 1982?

Mr. BAKER. I think it does reverse that, yes.

The CHAIRMAN. Now, read that again.

Mr. BAKER. All right. That was just the tail-end of the whole thing. I will be happy to give the committee a full copy of the resolution.

The CHAIRMAN. Just the end of it.

Mr. BAKER. "Be it finally resolved that we call upon Baptists to express their confidence in the U.S. Constitution, and particularly in the first amendment, as adequate and sufficient guarantees to protect these freedoms." The debate at the convention——

The CHAIRMAN. I am not too sure that wording reverses. It just said they believe in the Constitution and the first amendment.

Were you present at the 1983 convention?

Mr. BAKER. Yes, I was.

The CHAIRMAN. And you are convinced that the intention there was to reverse the 1982 resolution?

Mr. BAKER. Yes, Senator, but really, you have to realize that each Southern Baptist Convention meeting speaks for itself, and that is the expression of the opinion of those people there at that time. And yes, I was there, involved in the debate.

The CHAIRMAN. To reverse the 1982?

Mr. BAKER. I was there in 1982 and I was there in 1983, and it did reverse, in my opinion, the resolution in 1982.

The CHAIRMAN. That is your interpretation of that contained in the 1983, to reverse the 1882 resolution?

Mr. BAKER. Yes, sir; that is correct.

The CHAIRMAN. All right, thank you.

Next, the Lutheran Council. We will be pleased to hear from you.

STATEMENT OF REV. CHARLES V. BERGSTROM

Reverend BERGSTROM. Thank you. I should like to request that these remarks be added to the written report that we have turned in already, Mr. Chairman.

Fortunately, the Lutherans have not changed their minds, and as I speak to you this morning, it is on behalf of three Lutheran Church bodies, numbering approximately 6 million, who have consistently reaffirmed their support to the Supreme Court decisions of 1962 and 1963, and opposition to bringing in any kind of group prayer in public schools. There are a number of decisions which are referred to in the report which has been submitted.

I will comment very briefly only on the public policy part of that. It has been covered by attorneys, and I know some of the members of this panel will do it well. I'd like to point out again the questions about the use of words such as "voluntary" in any proposals, which we believe now is intact; the use of polls, in which the question is asked about "returning" prayer, to which most people will answer "yes"; the matter of history from the facts of the study made by Macalester College. Even prior to those decisions, approximately 91 percent of the schools in the Far West and 74 percent of the Midwest, did not use prayers in schools, even prior to the decisions to which I have referred.

I repeat the requests of people who ask, who is going to decide. I think moving it from these halls to the communities is only going to postpone the aggravation and the opposition that will always be a part of that. We do not feel there is anything that has been deprived by these decisions. In fact, there is a protection which we hold very dear and very important. In this week, I can give you references of three young Jewish people who spoke to me about the problems they had in small Midwestern towns where they were a minority and a school in the city of Boston, where a similar experience was tolerated. And over and over again, we want to underscore the Constitution's right to protect the individual and not simply to help those who are in the majority. So, transferring that to communities, sir, will not be very much help.

I would like to add a new note this year, after having participated in these kinds of presentations for many years, more of an underscoring of the religious element of prayer and what it is. I feel it gets trivialized, and it is embarrassing also to those of us in church to hear the bandying around of terminology as to what prayer ought to do and what its object ought to be. To us, it is a family issue, a congregational issue, and a religious issue, beyond all the others that have been spoken of.

I think in recent years you have been hearing a great deal from what I call quasi-religious political organizations in Washington, who have every right to engineer strong support for school prayer, and they have done that time and time again. You will hear from some of them this morning.

I would like to speak a word on behalf of mainline churches, and most especially this morning, of course, for the Lutherans. We are not attacking public schools, as is often done by others. We are not concerned about secular humanists. We believe that Jesus Christ was as human as he was divine. We do not believe God could get kicked out of the schools—if so, who would ever bother to pray to such a weak God who could not hold onto his place in the school system? And more than that, the manner of being deprived is overdone in this case. You could just as well say that students from my congregations are deprived of the right of the sacraments or confession because they are not held in the public schools. Prayer is just as sacred, just as important to Christians who are deeply committed. So we do not want it discussed as a matter of discipline, or a way to evangelize children. I do not think Jesus would want that kind of manipulation with prayer, to use some kind of subterfuge to sneak people into membership in the church.

I think it is time that we said this kind of corruption of theology is almost an aggravation to Christians and the depth and meaning of prayer to all of them; the kind of theology which does not underscore the fact that prayer is the deepest kind of experience with God almighty. It is a struggle, and it involves renewal and agony. The example of Christ is so clear about what prayer is. It is not some little gathering together of some students. There is a Biblical illiteracy which seems to be rampant in much of what is said. Christ always taught us to pray alone, and Saint Paul talks about the constancy of prayer which always ought to be done, and can still be done in our public schools, privately.

Prayer partakes of the nature of a sacrament to Lutherans. It is wrong to have that bandied about and overly used in terms of discussion about how it ought to be used in the secular world. We think it is time for that to be put in the proper perspective. God does not need to be added to education; he is there. God makes his moves; we are not the ones who call upon him to make those kinds of moves.

Therefore, we feel it is not only unconstitutional, but it is also unevangelical. It is unfair to promote these kinds of things and to make civil religion kind of a spokesperson for playing church.

I respect President Reagan and his right to his opinion, and I respect his attitude toward his God. But I firmly disagree when he says that prayer does not hurt anyone. It has hurt many, many people.

I'd like to close with a quotation from Dr. Martin Luther, who would have celebrated his 500th birthday this particular year, "Where secular power presumes to prescribe laws for the soul, it encroaches on God's government and misleads and destroys souls."

Thank you.

[The following was received for the record:]

PREPARED STATEMENT OF REV. CHARLES V. BERGSTROM

My name is Charles V. Bergstrom. I serve as Executive Director of the Office for Governmental Affairs, the Lutheran Council in the U.S.A. On behalf of the Council, I express appreciation to the Senate Judiciary Committee for the opportunity to testify in support of the Supreme Court decision favoring the voluntary and personal nature of prayer. I speak in strong opposition to the proposed amendments to the U.S. Constitution dealing with prayer in public schools. I am speaking on behalf of three church bodies of the Lutheran Council:

> The American Lutheran Church, headquartered in Minneapolis, Minnesota, composed of 4,900 congregations having approximately 2.4 million U.S. members;
>
> The Lutheran Church in America, headquartered in New York New York, composed of 5,800 congregations having approximately 2.9 million members in the U.S.; and
>
> The Association of Evangelical Lutheran Churches, headquartered in St. Louis, Missouri, composed of 275 congregations having approximately 110,000 U.S. members.

These Lutheran church bodies continue to maintain that the proposed constitutional amendments are unnecessary from a religious point of view and unwise from a public policy perspective.

The Lutheran church bodies I represent are aware of the serious theological and public policy difficulties which arise when government mandates religious exercises in public schools. Since the landmark decisions of the Supreme Court in 1962 and 1963 (Engel and Schempp cases, 370 U.S. 421 and 374 U.S. 203), these churches have consistently resisted legislative attempts to circumvent the court's actions or to enact a prayer amendment to the U.S. Constitution. This activity has been undertaken carefully and deliberately. Within these church bodies, consideration has been given to the school prayer issue by lay persons and members of the clergy, by individuals within our congregations and staff of regional and national church conventions at which congregational representatives gather, and subsequent implementation has taken place according to the churches' constitutions and bylaws. It represents the end result of an organized and democratic process which is acknowledged as legitimate by members of these church bodies.*

INAPPROPRIATE RELIGIOUS PRACTICE. Our position on school prayer reflects our theological and biblical conviction that not only are prayers in public schools not essential to the cultivation of religion in our youth, but in fact such religious practice can be harmful, especially when offered by an atheist or imposed on a person of different faith. The church bodies I represent maintain that the nurture of religious faith belongs in the home and in the church, not in the public schools. The families, not the school boards, have overriding responsibility for their children's religious education. Lutheran churches share a deep concern for the families that it's religious life be centered at home and in church. We would make the following assertions:

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*This testimony is based on statements of the Lutheran churches on prayer in public schools, two of which date back to 1964: "Prayer and Bible Reading in the Public Schools" (Lutheran Church in America) and "Prayer in Public Schools" (The American Lutheran Church). Since that time, the position articulated in these statements has been repeatedly reaffirmed by the Executive/Church Councils of these bodies and by their biennial conventions.

1. We object theologically to "non-denominational prayers" which may uncritically mix nationalism and religion. As the Lutheran Church in America statement cited above says so clearly, "The more we attempt as Christians or Americans to insist on common denominator religious exercise or instruction in public schools, the greater the risk we run of diluting our faith and contributing to a vague religiosity which defines religion with patriotism and becomes a national folk religion."

2. We believe that the purpose of prayer is to praise and petition God, not to serve the secular purpose of creating a moral or ethical atmosphere for public school children. Prayer is communication with God which should change the person who prays--but it is not a tool to be used to "christianize" or "moralize" public education. Thus, the intent in sponsoring public school prayer is vitally important, and the Lutheran churches I represent resist any attempt by legislators or by school authorities to inject religion into the public classroom in an effort to create a wholesome milieu for public school learning or to overcome immorality, as some independent preachers claim it should. Biblical teaching is clear and Christ's example is ultimate. Lutherans are offended by untheological calls to "put God back in school," or claims that such efforts are "evangelical." They are political. They represent a terrible misunderstanding of prayer and ask members of Congress to act on a religious matter that divides people. Prayer can be manipulative and used as a tool for trying to "convert" unbelievers and making this a "Christian Nation"-to "Christianize America." That is a shameful affront and an embarrassment to the church. The Bible invites Christians to pray alone and in the congregation, not as a public or educational interlude.

3. We perceive no need to "put God back into education." He is there. As Lutherans in the U.S., we affirm the principle of "institutional separation and functional interaction" between church and government and recognize the distinctive calling and sphere of activity of each institution. We believe that God is active and powerful in all human affairs and operates through human institutions which maintain peace, establish justice, protect and advance human rights, and educate children--all proper concerns of the government. God's involvement in the good things of His creation, including education, is dependent on His love for us, not on government-sponsored prayer in public schools or other public buildings. One does not become more moral or evangelical by pushing for prayer in public school. Quite the opposite can be true.

4. We are concerned about the quality of public school education and understand it to be inadequate when it is premised either on indifference or antagonism to the religious elements in history, in community life or in the lives of individuals. While the Supreme Court has ruled state-mandated prayer unconstitutional, it has not ruled out the study of religion in public schools. In this area, Lutherans see a positive challenge to interact with public school educators in order to develop programs which acknowledge the religious and moral dimensions of life while also respecting the larger religious neutrality mandated by the Constitution. As a parish pastor and in my present position I have supported public education and worked with school authorities.

The Lutheran church bodies I represent point out that the historical situation in the United States has changed since the early days of the Republic when underlying religious beliefs were often assumed. The influx of immigrants, with varying traditions and creeds, and a range of other historical circumstances have contributed to a society which is thoroughly pluralistic. The Lutheran churches view this situation as a challenge and not a threat--an opportunity to articulate clearly the tenents of our faith in this pluralistic culture. The "Founding Fathers" made clear the difference between reference to God and establishing Christianity as the one religion. Promotors of homogenized prayers exagerate the previous practice of prayer in our schools. Macalester College had a study showing that in the Far West 91 percent of the schools had no prayers. In the Midwest, 74 percent had no prayers. The court decisions did not unleash immorality, as some claim. We were always as we are now. Many in a religious minority can describe for us the unfair pressure on children to pray "like everyone else."

QUESTIONABLE PUBLIC POLICY. The Lutheran churches I represent also recognize the public policy difficulties prayer in public school create in terms of the religious rights of the individual and the welfare of the community as a whole. As Lutherans in the U.S., we cherish the guarantees of religious liberty which were written into the Constitution. We affirm the fact that the government safe-guards the rights of all persons and groups in our society to the free exercise of their religious beliefs and makes no decisions regarding the validity or orthodoxy of any doctrine. These religious freedoms are guaranteed to all, to members of traditional religious groups, nonconformists and non-believers. We recognize that, given our pluralistic culture, religious exercises in public schools infringe on the rights of some individuals and groups in society and invite sectarian divisiveness in the community. There is nothing holy or helpful in efforts to make this a "Christian" nation by school prayer. It is indeed questionable that this can do anything but harm religious faith. Our constitution is to protect the individual child who is different from the majority, not to give the religious majority power to bring their practices into the realm of education.

The changes mandated by the 1962/63 Supreme Court decisions should be understood in a positive rather than a negative light by those concerned about religious freedoms. A 1971 statement of the Church Council of the American Lutheran Church affirming these decisions expresses this sentiment and focuses on the freedoms protected by the Court rather than the restrictions posed:

> We are free to pray in our own words to our own God. We are free to read the Bible in the version we prefer. We are protected against having to join in devotional exercises decreed by governmental authorities. We are free to pray in public and to read the Bible in public places. We cannot, however, force others to join us in such expressions of our religious faith.

The folowing Lutheran Church in America statement, reaffirmed in July 1980 by representatives of the congregations gathered in convention in Seattle, Washington, discusses the public policy implications of prayer in public schools:

> A due regard for all religious faiths and also for non-believers and nonconformists of all kinds makes it imperative that the public schools abstain from practices that run the risk of intrusion of sectarian elements and divisiveness. The public schools serve a unique and valued place in helping to build a civic unity despite the diversities of our pluralistic culture. It should be noted that when the state deeply involves itself in a religious practice in the public schools, it is thereby not only appropriating a function properly served by the church and the family, but subjecting the freedom of believers and unbelievers alike to the restraint that accompanies the use of governmental power and public facilities in the promotion of religious ends.

The Supreme Court has not prohibited voluntary prayer in schools--indeed, there is no way it could ban personal communication between an individual and God. What has not stood up to judicial scrutiny are "religious" sessions mandated by law or organized by school officials. Contrary to the statement of President Reagan, children can be harmed by classroom prayer or the need to leave a classroom because of prayer.

The question of just what comprises voluntary prayer is central to this issue. The Lutheran churches, like the courts, do not believe that any school-organized prayer sessions can be completely "voluntary." Children attending public schools are there under compulsion of public law. Public school facilities are used, and the teachers--symbols of authority in the classroom--may supervise the exercise. These factors combine to operate with coercive force on young and impressionable children, inducing them to take part in these exercises, despite freedom to be excused from participation. That cannot be compared with adult prayer in Congress or reference to God on coins. Persons with a genuine regard for prayer and the Bible object to having their children engage in these exercises when they are mandated by the compulsion of law. Prayers of one religious body are very different from another. Our fundamental question is, "Whose prayers are to be offered?" This question has been too easily ignored in in the promotion of these amendments.

Those promoting constitutional amendments already differ among themselves as to what type of "voluntary prayer" would be acceptable. Some would find inter-denominational prayer acceptable, while others would insist on non-denominational prayer; yet others ask for silence. To deal with these religious differences, several have suggested that "community standards" be the means for determining actual practice in the public schools. However, the "community standard" argument ignores the reality and the depth of these religious differences, especially as they regard religious minority groups. Religious differences, even among advocates of school prayer, will surely find expression in diverse practices offensive to some and leading to harmful and bitter contentions. The town of Bristol, Virginia's divided community in 1983 shows the results of bringing religious practice into public school under the unrealistic promises of: "bringing God back into school" or "no person shall be required to participate." (in prayer)

The Lutheran churches' belief in God and the variety of channels through which He works is biblical and personal. We believe we are carrying out God's work through the church's evangelical ministry of salvation. Yet another facet of our response to God's Word is working with government to establish justice in the world for all groups and for all individuals--those who believe in God and those who do not. However, these two ministries of Lutheran churches are not to be uncritically confused; different means are appropriate to achieve the goals of our different ministries. Prayer is a personal communication with God, to be used because of our faith in God; it is not an appropriate public policy tool. Conversely, in our historical situation, the public schools are not an appropriate channel for evangelization. Our understanding of both of these ministries of the church leads us to strongly oppose the proposed constitutional amendments on prayer in public schools.

The **Chairman**. Thank you very much.

Now, as I understand, both of you who have just spoken oppose the President's proposal; is that correct?

Mr **Baker**. Yes.

Reverend **Bergstrom**. Yes.

The **Chairman**. Would you favor the subcommittee's alternative proposal?

Reverend **Bergstrom**. No.

Mr. **Baker**. Our position has been that we are opposed to an amendment to the Constitution until the judicial and the legislative processes have been exhausted, which they have not.

One of the points that I made in my statement was that when you put new words into the Constitution, you are going to get involved in interpretation. For example, on the "equal access" clause of Mr. Hatch's proposal, if you provide for open to all voluntary student groups, the first time that one thoroughly unacceptable group, voluntary and student, comes in and wants approval, the ultimate outcome of that would be that the only way you could have equal access is no access. And I think that this is not the intent. I think you need to look at the words much more closely.

You do not want to put into the Constitution words that are untested and uninterpreted and let them be played with. We are pretty well sure where we are now, and we are opposed to both of the proposed amendments.

The **Chairman**. Reverend Bergstrom, what is your position on the alternative of the subcommittee?

Reverend **Bergstrom**. We oppose that, also. I think maybe if the word "group" had not been added, we would not have the problem; but I think whenever you try to bring together groups of students in school, whether it is included as part of silence or not, that is one thing, for discipline. But to say they are gathered there for the purpose of prayer—we object to both, sir.

The **Chairman**. Thank you.

Now we will pass to the National Council of Churches.

Please proceed.

STATEMENT OF REV. DEAN M. KELLEY

Reverend **Kelley**. Senator, I would like to express appreciation for the high level of the hearings thus far, and hope that it will continue. There will be some with whom I might disagree, but I would like to express respect for their views, as I hope they will respect ours.

The National Council of Churches represents 33 denominations, with over 40 million constituents. We do not purport to speak for all of them, but for the governing board, which they elect and designate in their own way.

One of the denominations, the Greek Orthodox Church, has dissented from the view I will express, and I wish to make that clear. The other 32 have supported it.

I have testified previously about the administration's proposal. I would like to ask that the testimony that I have submitted be included in the hearing record at this point.

The CHAIRMAN. Without objection, so ordered.

Reverend KELLEY. We are opposed to both proposals to amend the Constitution, for somewhat different reasons. Rather than reiterating some of the things that have been said earlier, I would like to try to suggest a little different interpretation of what the history of the interpretation of the first amendment in this country means.

It is a saga in the increasing discovery of what true religious liberty means over the condition of mere religious toleration, which prevailed in Europe prior to the writing of the American Constitution, and still does, in some places today.

Under the European traditions, a majority or established religious group represented the religious consensus, supposedly, of the population. Minority groups could either endure the practices of the religious tradition that dominated in silence, or they could emigrate to another place. It is that emigration of dissenting minorities which helped to found this country. It has been said that they came to this country to seek religious liberty, and now some contend that that religious liberty takes the form of wanting to have collective oral prayers sponsored by the State in public schools. I think that is a serious misunderstanding. What they came to this country to seek was a place where they could be fully first-class citizens even if they did not agree with the majority and predominating religious traditions of a given locality.

Now, most people still think in terms of the inherited tradition of religious toleration, so when we hear the public opinion polls say that 60, 70, 80, or 90 percent of the people would like to have prayer in public schools, I think what we are dealing with there is cultural lag; that people tend to think in the inherited patterns that the majority should rule in matters religious, although that is contrary to the spirit and intention of the first amendment. In fact, the Supreme Court has said:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote. They depend on the outcome of no elections. (*West Virginia* v. *Barnette*, 319 U.S. 624, 1943).

I think the administration proposal would create a black hole in the middle of that principle.

Let me turn to the other proposition in the remaining minute. In our view, it not only merely restates present or potential law, but it creates a small black hole in the middle of the first amendment, because it would sweep away some of the existing interpretation which protects the rights of individuals and of educational institutions.

The Supreme Court's *Widmar* decision said that a State university, if it creates a "limited public forum," is obliged not to discriminate against religion in access to that forum. But the concept of a limited public forum would be swept away by the committee's substitute proposal, in the sense that then any voluntary student group would have the right of equal access even of its activities interfered with type primary function of the educational institution.

The CHAIRMAN. Thank you very much.

[The following was received for the record:]

PREPARED STATEMENT OF REV. DEAN M. KELLEY

SUMMARY

This testimony opposes the Administration's proposal because it is unjust, unwise, unnecessary and a throwback to the old European tradition of mere religious toleration that our forebears fled to set up a condition of full religious liberty under the federal First Amendment.

This testimony opposes the other proposal because it is unnecessary, out of all proportion to the supposed ill it is designed to remedy, and would supersede important Constitutional safeguards of individual rights and liberties and the judicial doctrines built up around them over many decades.

My name is Dean M. Kelley. I am Director for Religious and Civil Liberty for the National Council of the Churches of Christ in the U.S.A. and have held that position since 1960. I am an ordained minister of the United Methodist Church and have served local parish churches for 13 years before coming to the National Council. I have been assigned by the President and the General Secretary of the NCC to present this testimony on behalf of the NCC.

The National Council of Churches is the cooperative agency of thirty-two Protestant and Eastern Orthodox national religious bodies which have an aggregate membership of over 40,000,000. We do not presume to speak for all of those members any more than a Senator can speak for all of the people in his state. We speak for the Governing Board of the NCC, a representative body of about 300 persons chosen by the member denominations in proportion to their size and according to their own respective processes. This testimony is based on a policy statement of the NCC, "The Churches and the Public Schools," adopted in 1963 and reaffirmed by a resolution on "Prayer in Public Schools" adopted May 13, 1982. (The Greek Orthodox Archdiocese of North and South America dissented from this policy.) Copies of these are attached.

Since there are two proposed Constitutional amendments before the Committee, we address them in succession. Since the first proposal is virtually identical with one that was before this Committee a year ago, we offer substantially the same testimony on it that we gave here on July 29, 1982, which follows:

1A

The Administration's proposed constitutional amendment reads as follows:

> Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or public institutions. No person shall be required by the United States or by any State to participate in prayer.

This proposal to amend the U.S. Constitution is unjust because it makes the rights of members of religious minorities dependent upon the self-restraint of religious majorities, a condition the First Amendment was designed to prevent. The First Amendment was a heroic experiment in religious liberty, an institutional invention unique at that time in world history but since imitated in many lands. For the first time in human affairs, the Founders of this nation created an arrangement in which the civil covenant binding the inhabitants into one nation was to be independent of the religious covenant(s) by which they undertook to serve God according to their several faiths.[1]

Instead of trying to insure national unity by insisting that all inhabitants profess the same religious faith, the Founders conceived that all could be equally citizens irrespective of their religious commitments. As the Virginia Statute for Religious Freedom, a forerunner of the First Amendment, puts it:

> ...no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested or burdened in his body or goods, nor shall otherwise suffer on account of his religious opinions or beliefs, but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities. 2

This was an important step beyond the arrangement prevailing in Europe, a condition of religious toleration, in which members of minority religious groups were permitted to coexist with the majority on the condition that they conform to the dominant or established faith -- or at least make no outward show of non-conformity. But it was clear that they were accepted on sufference only; they were guests in someone else's house, to be admitted only on condition of good (religious) behavior. They were not fully citizens because they did not share the religious commitment expected of all loyal members of society. Because they did not share that religious commitment, their civil loyalty was suspect.

Toleration was a relaxed form of the arrangement that came to dominate Europe after the Protestant Reformation: cuius regio, eius religio. Under this principle of "territorialism," the religion of the ruler became the religion of his realm, and those who didn't like it were free (or sometimes required) to emigrate. (That was an improvement over the pre-Reformation situation where religious non-conformers were burned at the stake, but it still left much to be desired.)

What the proposed amendment would do would be to abandon the American experiment of the independence of the civil covenant from the religious covenant and regress to the European situation of toleration and territorialism, except that in this society the ruler is the majority of the electorate. The majority would rule in the religious forms to be instituted in public schools and other public institutions. Members of religious minorities, who are equally citizens and whose taxes equally support those institutions, would no longer be equally at home in them. They would be guests in institutions belonging more to the (religious) majority than to them, second-class citizens because of their religious non-conformity.

But are a few non-conformists to be able to veto the wishes of the majority? In most things, no. The majority will rule on the levying of taxes, the building of schools, the regulation of traffic and business. But, as the Supreme Court profoundly stated in West Virginia v. Barnette:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. [3]

The Justice Department's interpretation of the President's proposed amendment makes no bones about the universal acceptability or non-sectarian character of the prayers that would be admissible if the amendment is adopted. It says:

> "If groups of people are to pray, someone must have the power to determine the content of such prayers.[4]
>
> "Public authorities should have the right to conduct public prayers for those who desire to participate...." [5]

(This is certainly a more realistic approach than supposing that any prayer can be truly non-sectarian, since a lowest-common-denominator prayer would be unacceptable to devout Christians if it did not include the name of Jesus Christ.)

Though the Justice Department carefully couches its exposition in terms of "permitting" people to pray, the references to "power to determine the content of such prayers" and "public authorities" having "the right to conduct" such prayers make it clear that the occasion will be something other than spontaneous popular enthusiasm for public prayer. It will, understandably, have to be planned, scheduled, "determined," "conducted."
By whom? Not by individual children suddenly expressing the wish to pray, but by "public authorities": teachers, principals, school boards, states. This is not merely "permitting" people to pray, this is the state arranging for people to pray, and to pray prayers selected by the same authorities, even if it is only by inviting a participant to offer prayer on behalf of all.

So there is no pretense that it will be non-sectarian prayer. It will be a prayer more acceptable to some than to others, which is the meaning of "sectarian." We may hope that prayers of various faith-traditions might be used in rotation, but there is no assurance that a few Jewish pupils might not have to hear Christian prayers offered all year round in the public schools that are supposed to be as much theirs as anyone else's.

Some may say that this can surely do them no harm. But that is for them to say. Such an assurance is like a fat man leaning on a thin man and telling him it doesn't hurt! Orthodox Jewish children are taught that prayer must be made in certain postures, with prayer-shawl, head covered, etc. What would be undertaken in public schools would not be "prayer" for them, but a travesty of prayer as they understand it.

The solution for them, we are told, is to be excused. "No person shall be required by the United States or any state to participate in prayer," the amendment says, and that provision is designed to cure all ills that might arise. But what does it mean? Are there pressures and expectations that do not rise to the level of state-imposed "requirements" that still might have a strong adverse effect on impressionable children? How about the teacher's using a sarcastic or scornful tone of voice when excusing those who wish to be excused from classroom prayer? How about the incredulous questions or derisive taunts of fellow-pupils? How about having to stay after school each day to "make up time" spent out of the classroom during prayer periods? How about voluminous penmanship assignments to copy sentences like "Christmas is Christ's birthday" or "Prayer changes things"? (That was an actual experience reported on a TV call-in show).

And how about the teacher? Is the teacher not to be "required" to participate in prayer? And what will be the attitude of a teacher who does not understand or appreciate prayer but is told that it is part of the teacher's responsibility to "conduct public prayers"? Will the teacher have a favorable or reverent attitude toward that activity? Will the children in the classroom not know what teacher's attitude toward prayer is?

Even if we suppose that no subtle pressures are applied to encourage conformity in public prayer, the provision for excusal is itself the tell-tale throwback to an earlier age. It tells the religious minority, "This is our classroom, where our religious prevails; if you don't like it, you can leave -- (emigrate). You can't stay here and be a full member of our civil community unless you conform to our religious practice (or at least endure it in silence)."

It is a clear regression to territorialism, with all the misery that has produced through several centuries.

We are told that a huge majority of the population today wants prayers in public schools. That is no doubt true. Most people tend to cling to accustomed ways, and one of the accustomed ways of thinking is the mindset of (mere) religious toleration inherited from bygone centuries in Europe. Even the Supreme Court did not have-- or take -- occasion consider whether state-sponsored prayers in public schools are compatible with true religious liberty until 1962, and we should not be surprised if this cultural lag affects the general public for a few decades longer.

But we are told that no such problems troubled the American classroom prior to the Supreme Court's (mis?)reading of the First Amendment in 1963. All was supposedly sweetness and light when the several states, and indeed each local community, could set its own standards for religious practices in public-school classrooms. But that is -- unfortunately -- not true. The record is replete with stories of children made to suffer because they would not conform to religious practices in public schools. A Massachusetts case in 1859 involved a Roman Catholic boy of eleven, Tom Wall, who, acting on instructions of his parents and his priest, declined to confirm to a classroom religious practice. He was whipped on the hands with a rattan stick until he consented to conform.[6] In some states, litigation led to the elimination of prayer from public schools long before 1963. It was a fertile field for community strife and litigation, and courts reached diverse conclusions, sometimes upholding the practice, as in the case of Tom Wall, cited above. Thus the establishment of religion -- in this respect at least -- had come to have a different meaning from one jurisdiction to the next.

But that is not what a federal Bill of Rights should permit. How many of us wish to submit our most precious rights and liberties to local option?

I B

The proposed amendment is unwise because it would authorize practices in public schools that would permit government intrusion into a realm sacred to the family and the church and also do a real dis-service to what we understand to be genuine Biblical faith.

As the NCC resolution states:

> WHEREAS, the recitation of prescribed nondenominational prayer demeans true religion by denying the traditions of faith groups while imposing on some children religious practices which are offensive to them;...
>
> THEREFORE, be it resolved that the Governing Board of the National Council of the Churches of Christ in the U.S.A.:
>
> Reaffirms its belief, as set forth in the Policy Statement on "The Churches and the Public Schools," that "Christian nurture and the development and practice of Christian worship are unescapable obligations of the congregation and the family;" and
>
> Reaffirms its support of the Supreme Court language describing the First Amendment as providing no role for government in prescribing or providing for prayer in public schools.

Prayer in public schools is a custom characteristic of a homogeneous community and nation, but ours is no longer such, and it is unwise to pretend that it is. For better or worse, it is religiously pluralistic, and the 1963 decisions of the Supreme Court were a belated recognition of that fact.

The President of the NCC, Bishop James Armstrong of the Indianapolis Area of the United Methodist Church, has emphasized this reality in a statement which he prepared to be included in this testimony:

> I am a Christian. I pray for the coming day when my country, the United States of America will be a Christian nation. By that I mean I pray for the coming of a day when the values, ideals, spirit and commitment of this nation will reflect those of the Man from Nazareth. Yet, even as I write this, I realise that these words mean different things to different Christian people. Roman Catholics and members of the Assemblies of God, Syrian Orthodox, Christian Presbyterians, Mormons and Seventh-day Adventists would not agree on what is meant by "the values, ideals, spirit and commitment...of the man from Nazareth." Again -- even as I write these words, I am mindful of the fact that ours is a pluralistic nation in which Catholic Christians, and Protestant Christians, Muslims, and Jews, Buddhists and Hindus, honest agnostics and convinced non-believers are regarded as equal under the law.
>
> I can pray that the United States will become Christian (as I understand and interpret my faith) with a measure of confidence and hope because of the nature of the republic and the composition of its peoples. We are encouraged freely to express and exercise our convictions while being denied the right to impose those convictions on others. The doctrine of the separation of church and state, as defined in the First Amendment of the Constitution, provides the essential safeguards. It insists that the church dare not be viewed as an arm of the state. It insists that the state dare not dominate or intimidate the church. The "wall

> of separation" is a porous wall. Each of these fundamental institutions of society, church and state, will influence the other. Neither, in the final analysis, will be permitted to control the other. This is doubtless what Martin B. Brown, an eminent American jurist, had in mind when he called the doctrine of separation, "the greatest achievement ever made in the course of human progress." Nothing must be done to destroy that achievement.
>
> It is because I believe in the Constitution of the United States and in the persuasive and contagious power of the Gospel of Jesus Christ that I stand unalterably opposed to the so-called "school-prayer amendment." Let the church be the church, a basic social institution where the tenets and practices of the faith can and should be taught and practiced. Let the home be the home, where parents can teach their young by precept and example that which they believe. And let the state be the state, neither an arm of sectarian Christianity, nor a voice for unbelief, but an expression of government which guarantees the rights of each individual to be faithful to his or her own conscience.
>
> I am a father and a grandfather. I want the youngsters in our family to be brought up in a religious tradition. My home and my church must assume this nurturing responsibility. I do not want a teacher who happens to be a religious -- or an irreligious -- zealot, a person who may be the antithesis of that which my particular faith represents, to use the public school as arena for manipulating and forming the philosophy of life of members of our family. That is not the function of the state. It is the blessed privilege and responsibility of the institution of religion and of the family to impart religious truth.
>
> I will continue to pray and work for the evangelization of my country. I will, however, stand opposed to those who would write their sectarian metaphysics or religious practices into the laws of the land.

The United States is no longer a "Christian nation" -- if it ever was. The National Council of Churches is opposed to the mistaken claim that it is, or ever could be, except in the sense suggested by Bishop Armstrong. In fact, in a 1959 policy statement in opposition to the "Christian Amendment," the Board stated:

> Previous attempts to maintain "Christian states," in earlier centuries as well as our own, have been fraught with great problems and have failed in disillusion. They have frequently denied general liberty, and religious liberty in particular, to all who did not belong to the dominant body of Christians.... To declare the United States a "Christian nation" in the churchman's sense of "Christian" is to assert less of truth than of pretension.

(This policy statement is attached.)

Many people have responded favorably to the proposal to "get the government off our backs," and particularly to keep it out of any activities that might interfere in family life and the nuture of children by their parents. It is surprising that some of the same people are now proposing to allow State and local governments, through the state instrumentalities of public schools, to introduce religious forms and practices that will be at odds with those which some parents are trying to inculcate in their children. In this most sensitive area of family life, the clumsy and untutored intrusion of governmental authorities, however well-intended, is especially unwise.

It is sometimes claimed that some children would never hear the name of God if they did not have the benefit of public-school prayers, but that is precisely the kind of intrusion that some parents, if they are intentionally bringing up their children in a non-theistic approach to life -- as is their right -- may wish to avoid. Other parents may feel that their particular devout form of faith will not benefit from perfunctory recitations of someone else's prayers in a non-ecclesiastical setting, and so oppose it because public schools prayers are not religious enough.

The National Council of Churches cannot overlook the fact that Christians are admonished by the Lord Jesus Christ in the Sermon on the Mount not to make a show of prayer in public places:

> And when you pray, you must not be like the hypocrites; for they love to stand and pray in the synagogues and at the street corners, that they may be seen by men. Truly, I say to you, they have their reward. But when you pray, go into your room and shut the door and pray to your Father who is in secret; and your Father who sees in secret will reward you.
>
> (Matthew 6: 5-6)

Christians should be wary of public school prayers for this reason, if for no other. It surprises us to see those who claim to be "Bible-believing Christians" disregarding this central admonition on how Christians should pray and pressing for a Constitutional amendment which would allow what the Lord of the Church does not.

It is especially unwise to inject prayer into a gathering of people brought together for other, and non-religious purposes, particularly when -- as in the case of public-school children -- they are brought together by coercion of law. They are not without other places to pray, together with others of common belief, if they should wish to do so. And the contention that some of them may wish to pray in a public institution does not make it incumbent on others to accede to that wish.

Those who wish to pray in public places -- contrary to the Lord's admonition -- are not entitled to commandeer public institutions as vehicles for their own free exercise of religion at the expense of others -- equally citizens and equally entitled to the use of the public arena -- who may not wish to pray at that place or occasion. To tell the latter that they may be excused is to permit the former to pre-exempt the effective ownership of that public place by assertion of religious (as distinguished from civic) claims, a rather arrogant concept of what is necessary for their religious liberty!

I C

Lastly, the proposed Constitutional amendment is unnecessary, since any person can pray to God at any time or place, and the Supreme Court cannot prevent it, nor can the Congress enable it. It is only oral, collective, unison prayer that requires "state action," and since that kind of prayer is not necessarily more efficacious than the silent, inward petition of the heart (as well as being less consonant with Christ's admonition), it is obviously being sought for symbolic reasons, to make some kind of a statement or demonstration about the nature of the public school, the state, the nation.

Indeed, that is a recurrent argument of proponents of a prayer amendment: that public schools -- and our whole society -- have deteriorated since prayer was removed from public schools, and that restoring it will rectify the accumulated ills of the past two decades: vandalism, violence, drug addiction, delinquency, sexual promiscuity, and perversion, etc. Would that restoring prayers in public schools could have such a result! But children's lives are not transformed by magical incantations but by the models set for them in the conduct of their elders. And there is no need for a Constitutional amendment to enable adults to set a moral and righteous example for their children. They can do that now. To want to press prayer into service as a device for improving the moral climate of the schools -- desirable as that would be -- is to demean it from an end in itself -- communion with God -- to a means to another -- and lesser -- end: improving the behavior of (other people's) children. That is precisely what the Lord criticized about using prayer to make a public show for ulterior reasons.

The proposed amendment is unnecessary in another respect. If it is desired to make children more fully conscious of the religious roots and nature of this society, that can be done better by instructional, rather than by devotional means. After all, a school is better at teaching than at playing church. It would be appropriate for the public schools to teach children about the important part religion has played in human life, in history, in art, music and literature. The Supreme Court has not forbidden that; in fact, it said that no education is truly complete without it.

> ...it might well be said that one's education is not complete without a study of comparative religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.[7]

Yet few public schools are making any effort to fulfill that aspect of a "complete education," and few churches or church people are pressing them to do so. If, after that immense opportunity has been utilized to the fullest, there is still a deficit in the public-school graduate's understanding of the importance of religion, then it may be time to consider amending the Constitution, but until then, it seems more than a little premature.

II A

The other proposed amendment before the Committee is somewhat more elaborate:

> Sec. 1 Nothing in this Constitution shall be construed to prohibit individual or group silent prayer or meditation in public schools.
>
> Neither the United States nor any State shall require any person to participate in prayer or meditation, nor shall they encourage any particular form of prayer or meditation.
>
> Sec. 2 Nothing in this Constitution shall be construed to prohibit equal access to the use of public school facilities by all voluntary student groups.

It is preferable to the first proposed amendment in that it would authorize only "silent prayer or meditation," which makes possible a non-religious interpretation of the authorized activity for those who would prefer to understand it in that way, provided local school boards must preserve the dual option. If local school boards can themselves choose to offer only the option of "silent prayer," that advantage is lost.

The proviso "silent" also eliminates the entire issue of content, with its troublesome question of imposing one or another "sectarian" prayer on persons who do not subscribe to it, as well as the companion question of whether there is any such thing as a non-sectarian prayer, and whether it would be of any great significance.

Of course, there are sectarian forms of prayer -- even silent prayer -- as well as sectarian content. As stated earlier, Orthodox Jews believe that prayer is authentic only if offered in a certain posture, with head covered, wearing a prayer-shawl, etc. The next sentence seeks to preserve governmental neutrality with respect to the various possible forms of silent prayer or meditation. But what is the effect of that sentence on the Orthodox Jewish child who may be a minority of one in an otherwise Christian and/or non-observant classroom? Does the sentence mean that that child is not to be encouraged to bring a prayer-shawl, or to stand with head covered during the prayer? If that is the correct sense of the proposal, it would only reinforce the exclusionary effect upon the minority child of the majority (quasi) religious practice authorized.

II B

Section 2 introduces a somewhat different element, similar to the "Equal Access for Religious Speech" proposals embodied in recent bills by Senator Hatfield (S. 815) and Senator Denton (S.245), though not spelled out in as much detail as in their bills. The proposed amendment thus is open to a variety of interpretations. It clearly is not limited to secondary schools, as Senator Hatfield's bill wisely is, since children in elementary grades are much more impressionable than those in high school.

It does not specify that the access to public school facilities to be afforded "all voluntary student groups" is to be extra-curricular, i.e., before or after classes or in "non-instructional periods," thus creating the possibility that such groups might be able to claim access during the school day, thus moving from extra-curricular to a curricular status.

And what does the term "equal access" mean? Access equal to what? To each other? To non-voluntary student groups, such as Junior R.O.T.C. (required in some schools), physical education teams (required in some schools), etc.? This again seems to blur the important distinction between the curricular and the extra-curricular.

More important, it may sweep aside the important concept of the "limited public forum," which formed the basis of the U.S. Supreme Court's decision in Widmar v. Vincent,[8] holding that if a state university had provided a (limited) public forum for (extracurricular) student groups with non-religious purposes, it could not ban those with religious purposes without engaging in content-based exclusions of one particular category of speech.

The University was not obliged, however, to provide any public forum for any student groups, nor to open that forum to activities that would disrupt or interfere with the primary function of the university: education. It is these considerations which make a school a limited public forum, and which should be preserved in any constitutional amendment, so that no school is under the impression that it is obliged to provide a public forum for voluntary student groups or to permit activities there to interfere with its primary function of education.

II C

There is a range of other problems generated by this proposal that can only be suggested here: what are the appropriate safeguards against the school's sponsoring or appearing to sponsor, endorsing or appearing to endorse, the religious activities or identities of voluntary student groups of a religious nature?

There is nothing in the proposed amendment to require or imply that the public school(s) may not extend an equal mantle or aegis of sponsorship or endorsement to "all voluntary student groups" to which they afford equal access, including the explicitly religious ones. Yet this was a critical aspect of the Supreme Court's conclusion that the University of Missouri had not violated the prohibition against an establishment of religion: by providing an open forum for student groups it was carrying out a secular purpose and it was not lending its imprimatur to any one or all of them. [9]

The array of problems coming under the heading of possible implications of sponsorship of religious activities by the public school center around the role to be played by public employees, particularly teachers and administrators, in the operation of "voluntary student groups" meeting for religious purposes or activities:

1. May such groups -- or must such groups -- have a faculty sponsor? (Most public schools require non-religious extra-curricular groups to do so, but that is precisely an element of state sponsorship that would be most objectionable.)

2. Should there not at least be a faculty monitor present -- not to sponsor, direct, facilitate or participate -- but merely to "keep an eye on things," to see that the meeting proceeds in an orderly fashion without damaging or disarranging the school property, etc.?

3. Should a parent or other adult volunteer from outside the school be admissible for this purpose, to avoid faculty entanglement?

4. Does that pose a problem of "undue influence" from outside the school? What if one or a few parents or other adults want to get an evangelistic movement started in the public school -- or a "cult" group -- and they "inspire" a few students to request a "voluntary student group" with the unavowed aim of gaining converts among the students? For that reason, regular participation by "outside" adults seems to pose more problems than restricted participation by faculty members responsible to the school.

5. Can any outside speakers or resource leaders be brought in by "voluntary student groups?" -- Probably not on a continuing basis, for reasons suggested above, but single appearances might be permissible if that is the school's policy with respect to non-religious extra-curricular clubs.

These questions are listed to suggest a whole range of troublesome issues on which the proposed amendment is silent, and which would have a significant bearing on whether the state is genuinely neutral with respect to religion in the undertakings sought to be authorized under the proposal. Without some idea of how they would be resolved, it is difficult to judge whether the amendment would do more good than harm.

Do existing legal canons such as "governmental neutrality," "limited public forum," and non-sponsorship, non-imprimatur, non-establishment, apply to this proposal? They are based on the existing First Amendment and its interpretation by the courts over the years. But the new proposal, if approved by two-thirds vote of both Houses of Congress and ratified by the legislatures of three-fourths of the States, would supersede any Constitutional provisions in conflict with it, and any tests or canons derived from them: "Nothing in this Constitution shall be construed to prohibit..." etc. Thus a lot of very important and hard-won protections for religious and civil liberties could be swept aside by a new Amendment.

The Executive Committee of the National Council of Churches, meeting in San Francisco on May 10, 1983, has supported the general concept of the Hatfield bill (S.815), but the National Council of Churches cannot endorse the amending of the Constitution even for such commendable purposes (especially when there is good reason to think that ordinary legislation will suffice to accomplish the intended effect). Its Governing Board in 1963 resisted the suggestions for changing the wording (or effect) of the First Amendment and reaffirmed that view in 1982. They are no more receptive now to any similar proposals for tampering with the First Amendment.

FOOTNOTES

1. Littell, Franklin H., From State Church to Pluralism, Garden City, N.Y., Doubleday, 1962.
2. Blau, Joseph L., Cornerstones of Religious Freedom in America, Boston: Beacon Press, 1949, p. 74-75, emphasis added.
3. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).
4. Questions and Answers on the President's Voluntary School Prayer Amendment, The White House, Washington, D.C., May 6, 1982, p. 3.
5. The Administration's Proposed Constitutional Amendment Relating to School Prayer, May 14, 1982, p. 32-33.
6. Commonwealth v. Cooke, 7 Am. L. Reg. 417 (1859), involving Bible-reading in Massachusetts.
7. Abington v. Schempp, 374 U.S. 203 (1963).
8. Widmar v. Vincent, 454 U.S. 263 (1981)
9. Ibid

A PRONOUNCEMENT

A Policy Statement of the National Council of the Churches of Christ in the United States of America

OPPOSITION TO THE CHRISTIAN AMENDMENT PROPOSAL

Adopted by the General Board

June 4, 1959

The General Board of the National Council of the Churches of Christ in the U.S.A. reaffirms its support of religious freedom for all people and, being aware of proposals currently agitated for an amendment to the Constitution of the United States intending to declare that the United States is a Christian nation, sets forth the following concerns for the consideration of the churches and the nation.

(1) A constitutional amendment of this purport confuses the nature and function of the nation-state with the nature and function of churches. It would increase the present difficulties of citizens in comprehending and in continuing healthy separation and sound relations between church and state. These reflections are set forth with full awareness that this nation and all other nations stand constantly under the judgment and the sovereign authority of God.

(2) Previous attempts to maintain "Christian states," in earlier centuries as well as in our own, have been fraught with great problems and have failed in disillusion. They have frequently denied general liberty, and religious liberty in particular, to all who did not belong to the dominant body of Christians. In the American scene of today, a constitutional sanction for Christianity would tend to weaken the rights and liberties of citizens and others who are not Christians, to lessen respect for their distinctive concerns, and to accentuate divisions within the body politic.

(3) The intended amendment would strengthen the hands of those who desire financial and other privileges for Christian churches ready and able to secure them – such as support of school and welfare institutions, extended tax privileges for property and enterprises under Christian names.

(4) The proposed amendment would embarrass our ecumenical relations and our missionary enterprises and also general international relations as viewed by Christians and by the world majority of non-Christians, through officially attaching the Christian name to military, economic, and other acts and policies of the Government of the United States.

(5) To declare the United States a Christian nation in the churchman's sense of "Christian," is to assert less of truth than of pretension. That term rightly belongs to significant religion, with biblical and theological meaning and simply is not applicable to the American nation as a whole. Moreover, the proposal in question, if given an aura of validity by incorporation in the Constitution, would tempt many unthinking church members to complacent hypocrisy in their outlook upon society, national and international. In fine, it is perilous, even sacrilegious, to turn to the political forum for practical determination of the public meaning of the great word, "Christian." The church cannot share this word, central and peculiar to its character, with the nation-state.

In the light of these considerations the National Council of Churches records its opposition to the proposal for an amendment to the Constitution of the United States intending to declare the United States to be a Christian nation.

59 FOR, 1 AGAINST, 0 ABSTENTIONS

A PRONOUNCEMENT

A Policy Statement of the National Council of the Churches of Christ in the United States of America

THE CHURCHES AND THE PUBLIC SCHOOLS

Adopted by the General Board
June 7, 1963

As Christians we acknowledge God as the ground and source and confirmer of truth, whose Spirit is ever ready to respond to men's and children's search for understanding by correcting their fumbling misapprehensions and leading them into larger and fuller truth. Teaching and learning at their highest are pursued within this recognition. As Americans we are firmly committed to the right of freedom of conscience and freedom of religion, that is, the freedom of each citizen in the determination of his religious allegiance, and the freedom of religious groups and institutions in the exercise and declaration of their beliefs.

The American tradition with respect to the relations of government and religion, often described as "separation of church and state" does not mean that the state is hostile toward, or indifferent to, religion. On the contrary, governments—national, state and local—have prevailingly acknowledged the importance as well as the autonomy of religion and have given expression to this principle in many ways.

In present-day American society, with its diversity of religious conviction and affiliations, the place of religion in public education must be worked out within this recognition of the prevailingly positive attitude of the American people as a whole toward religion and safeguarding of religious liberty.

As Christians we believe that every individual has a right to an education aimed at the full development of his capacities as a human being created by God, his character as well as his intellect. We are impelled by the love of neighbor to seek maximum educational opportunities for each individual in order that he may prepare himself for responsible participation in the common life.

CONCERN FOR THE PUBLIC SCHOOLS

We reaffirm our support of the system of public education[*] in the United States of America. It provides a context in which all individuals may share in an education which contributes to the full development of their capacities. It serves as a major cohesive force in our pluralistic society. We also recognize that significant value derives from the fact that this system is financed by public funds, is responsive to the community as a whole, and is open to all without distinctions as to race, creed, national origin, or economic status.

DEFINITION OF ROLES

Religious ideas, beliefs, values, and the contributions of churches are an integral part of our cultural heritage as a people. The public schools have an obligation to help individuals develop an intelligent understanding and appreciation of the role of religion in the life of the people of this nation. Teaching for religious commitment is the responsibility of the home and the community of faith (such as the church or synagogue) rather than the public schools.

We support the right of religious groups to establish and maintain schools at their own expense provided they meet prescribed educational standards.

We support also the right of parents to decide whether their children shall attend public or non-public schools. The parent who chooses to send his children to a non-public school is not excused from the responsibility of the citizen to support and seek to improve the public schools.

Neither the church nor the state should use the public school to compel acceptance of any creed or conformity to any specific religious practice.

It is an essential task of the churches to provide adequate religious instruction through every means at their disposal. These include both those activities which individual churches provide within their own walls and also various joint ventures of churches involving cooperation with the public schools. Christian nurture and the development and practice of Christian worship are inescapable obligations of the congregation and the family. We warn the churches against the all-too-human tendency to look to the state and its agencies for support in fulfilling the churches' mission. Such a tendency endangers both true religion and civil liberties. At the same time, we call the churches to renewed worship, study, work and sacrifice to fulfill their mission as God's people in the world.

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[*] In this document the terms "public education" and "public schools" are taken to mean the system of public elementary and secondary education in the United States.

PLACE OF RELIGION IN THE PUBLIC SCHOOLS

No person is truly educated for life in the modern world who is not aware of the vital part played by religion in the shaping of our history and culture, and of its contemporary expressions. Information about religion is an essential part of many school subjects such as social studies, literature and the arts. The contributions of religious leaders, movements, and ideas should be treated objectively and broadly in any presentation of these subjects. Public school administrators and textbook producers are to be commended for the progress made to date in including objective information about religion in various subject matter fields. Teachers should be trained to deal with the history, practices, and characteristics of the various religious groups with competence and respect for diverse religious convictions. Their greatest influence will be through the life and attitudes they reflect in the classroom. They should be free as persons to express their own convictions in answer to direct questions from pupils when appropriate to the subject matter under study.

The full treatment of some regular school subjects requires the use of the Bible as a source book. In such studies—including those related to character development—the use of the Bible has a valid educational purpose. But neither true religion nor good education is dependent upon the devotional use of the Bible in the public school program.

The Supreme Court of the United States in the Regents' Prayer case has ruled that "in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by the government." We recognize the wisdom as well as the authority of this ruling. But whether prayers may be offered at special occasions in the public schools may well be left to the judgment of the board responsible for the program of the public schools in the local community.

While both our tradition and the present temper of our nation reflect a preponderant belief in God as our Source and our Destiny, nevertheless attempts to establish a "common core" of religious beliefs to be taught in public schools have usually proven unrealistic and unwise. Major faith groups have not agreed on a formulation of religious beliefs common to all. Even if they had done so, such a body of religious doctrine would tend to become a substitute for the more demanding commitments of historic faiths.

Some religious holidays have become so much a part of American culture that the public school can scarcely ignore them. Any recognition of such holidays in the public schools should contribute to better community understanding and should in no way divert the attention of pupils and the community from the celebration of these holidays in synagogues and churches.

We express the conviction that the First Amendment to our Constitution in its present wording has provided the framework within which responsible citizens and our courts have been able to afford maximum protection for the religious liberty of all our citizens.

CHURCH SUPPORT OF PUBLIC SCHOOLS

American public education should have the full and conscientious support of Christians and Christian churches. Therefore, we urge our constituency to continue efforts to strengthen and improve the American system of public education through positive steps such as the following:

1. Providing intelligent appraisal and responsible criticism of programs of public education;
2. Keeping informed about the needs of the public schools and studying issues related to public education as a basis for intelligent action as citizens;
3. Supporting able candidates for boards of education and being willing to serve as members of such boards;
4. Working at local, state, and national levels for improved legislative and financial support of public schools;
5. Emphasizing to prospective and present teachers the profession of public school teaching as a vocation that is worthy of the best service a Christian can give;
6. Exploring cooperative arrangements of the churches and schools whereby the church's teaching of religion may be improved.

In American education, there is a substantial inter-relation between primary, secondary and higher education.

It needs to be stressed that, in a substantial majority of publicly-maintained institutions of Higher Education, provision is offered for the voluntary election of courses in religion on a parity with all other subjects of the curriculum, and not infrequently for publicly-supported chaplains and other services of religion.

The question should be explored whether these arrangements through which religious instruction and services are provided within state institutions of Higher Education without infringement of law or offense to individual conscience may not offer suggestion for more adequate provision within the public schools of opportunities for the study of religion where desired, fully within the constitutional guarantees of freedom of conscience and of religious expression.

65 FOR, 1 AGAINST, 1 ABSTENTION

NOTE — The Greek Orthodox Church of North and South America has indicated that it disclaims and dissociates itself from this pronouncement.

RESOLUTION ON
PRAYER IN PUBLIC SCHOOLS

NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U.S.A.
475 Riverside Drive, New York, NY 10115

Adopted by the Governing Board
May 13, 1982

Whereas, in a Policy Statement entitled "The Churches and the Public Schools," adoped June 7, 1963, the Governing Board of the National Council of the Churches of Christ in the U.S.A. said:

> "Neither the church nor the state should use the public school to compel acceptance of any creed or conformity to any specific religious practice...";

Whereas, the same Policy Statement also stated:

> "The Supreme Court of the United States in the Regents' Prayer Case has ruled that 'In this country it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by the government.' We recognize the wisdom as well as the authority of this ruling...";

Whereas, the same Policy Statement continued:

> "We express the conviction that the First Amendment to our Constitution in its present wording has provided the framework within which responsible citizens and our courts have been able to afford maximum protection for the religious liberty of all our citizens...";

Whereas, the President of the United States has recently announced his intention to propose to Congress a constitutional amendment which could lead to the reinstatement of group prayer in public schools;

Whereas, the recitation of prescribed nondenominational prayer demeans true religion by denying the traditions of faith groups while imposing on some children religious practices which are offensive to them; and

Whereas, there is a danger that the rights of members of minority religions would not be adequately protected;

Therefore, be it resolved that the Governing Board of the National Council of the Churches of Christ in the U.S.A.:

> *Reaffirms* its belief, as set forth in the Policy Statement on "The Churches and the P Schools" that "Christian nurture and the development and practice of Christian wc are unescapable obligations of the congregation and the family"; and
>
> *Reaffirms* its support of the Supreme Court language describing the First Amendment as providing no role for government in prescribing or providing for prayer in public schools.

Policy Base: *The Church and the Public Schools,* adopted by the General Board, June 7, 1963.

The CHAIRMAN. We will be pleased now to hear from the American Jewish Congress.

STATEMENT OF JOEL H. LEVY

Mr. LEVY. Thank you, Senator.

My name is Joel Levy, and I appear here as cochair of the Governing Council of the American Jewish Congress. We have previously testified on Senate Joint Resolution 73, and we are opposed to that proposed constitutional amendment. I do not intend to repeat our testimony on that.

I would like to spend a moment on section 1 of the Hatch amendment which is before the subcommittee today. Section 2 is being addressed in a statement prepared on behalf of the National Coalition for Public Education and Religious Liberty and the National Education Association. We join in that presentation on section 2 of the Hatch proposal. But I would like just to keep my remarks on the so-called silent prayer or meditation proposal contained in section 1 of the Hatch amendment.

First, I think I should say a brief word about the commitment of the American Jewish Congress to the principle of religious liberty and the leading role that we have taken to support and defend the principle of the first amendment, separation of church and state. Our reasons for that are diverse. They are particularly important, though, when it comes to the public schools, for which the Jewish community and all minority communities in this country have a special place in their hearts. The public schools are a forum not for divisiveness, not for religious strife, not for the inculcation of partisan separation or religious separation. They are a means of educating our young people in American democracy, bringing new groups into the mainstream of American life, and not as a forum for religious partisanship. Any attempt to stick the nose of the camel into the tent of the public schools, in terms of religious freedom, is to us a serious, serious threat to the fabric of our society and the strengths of American democracy. We think the schools should be free of any kind of religious partisanship; that they should not be entangled bureaucratically with the teacher and parent associations, principals, politicians, deciding the manner in which so-called religiosity should be inculcated in our young people. That is the job of the church and the home.

Therefore, we strongly oppose President Reagan's proposal, and for much the same reason, we think it is a mistake for section 1 of the Hatch Act to be considered as a constitutional amendment.

We are troubled, as other witnesses have stated, either because it is pernicious, or because it is unnecessary. If it were truly unnecessary, I would be less concerned, but I have a deep concern that there will be attempts to construe the language in ways, particularly against the background against which it has been proposed, with the so-called perception that God has been banned from the public schools, as a means of reintroducing religion, partisan religion, into the schools.

Reference has been made to the use of the language referring to individual or group prayer, and we, too, have trouble with that concept. I do not know the distinction between individual prayer and group prayer, except that it will somehow engage school authorities in the job of separating students by their religion. I could foresee that at the beginning of the day, Catholic students would go to one room for their group silent prayer, the Methodists to another room, Jews to a third room. That may seem farfetched, but I do not know how to pour meaning into those words, other than to fear that they would be used to manipulate the concept of religious freedom in a way that would be quite contrary to the separation of church and state embodied in the first amendment.

We also are troubled with the question of what is voluntary, and what is required, particularly with young children. How do you explain to a first-grader or a second-grader what he is required or not required to do? How does one not participate in a moment of silence, if it is supposed to have a religious content?

All of these concerns lead us to believe that it would be a serious mistake to amend the Constitution to try and resolve a problem which depends so much upon the particular application of the facts and should be reviewed on an ad hoc basis in our view, under the first amendment, by the judiciary, to see if it passes muster under our traditional concept of separation of church and state.

Other than that, Senator, thank you very much for the opportunity to comment on the proposed amendment, and we would join with Mr. Derschowitz on the "equal access" provision and the comments of PEARL and the National Education Association

Thank you.

The CHAIRMAN. As I understand it, you are opposed to both the administration proposal and the subcommittee's alternative?

Mr. LEVY. Yes, we are.

The CHAIRMAN. I am a little puzzled. We have had prayers in schools here for 170 years, and your organizations have never raised any points until the Supreme Court handed down a decision. I wonder why that is.

Mr BAKER. Because we have done something wrong for 170 years does not make it right. But the point is simply that until the Court ruled in 1940 that the 14th amendment made the religion clauses of the first amendment applicable to the States, there was no standing, and there was no case that could be brought against actions of the States. So it has been since 1940 only that we have known that these religious clauses limited the States.

The CHAIRMAN. Well, it seems like somebody would have raised the point in 170 years.

Reverend KELLEY. Senator, in a number of State courts, it was raised, but not as a matter of Federal constitutional law. The State courts decided in both directions. As was pointed out, there are a number of States, particularly in the West, where I come from, where there never was prayer in public schools for that reason.

Reverend BERGSTROM. I would like to underscore that, Senator——

The CHAIRMAN. Well, still, I say 170 years is a long time, and it is kind of strange that no one raised the point, no one tested it, no one went to the Supreme Court of the United States, and then, when the Supreme Court handed down their decision, everybody seems to feel, well, that is it. I mean, it is a little strange, don't you think.

Now I have another question.

Reverend **Bergstrom**. Could I respond, Senator?

The **Chairman**. Yes, please.

Reverend **Bergstrom**. The same thing was true about civil rights in terms of the Supreme Court decisions. I think it helped wake many of us up.

Also, I think most of us were in the majority. You have to ask people in the minorities to really find out how they did suffer under that, and tried, very many times, to get changes. But some in small towns did not want to get into all that trouble. That was one of the problems.

The **Chairman**. And another thing I do not understand is that polls taken recently~~,~~ and that have been taken, show that 80 percent of the country supports prayer in schools. Now, how do you account for that? And, did any of your members answer these polls?

Reverend **Kelley**. I did account for it, Senator. I said that is an instance of cultural lag.

The **Chairman**. Cultural lag?

Reverend **Kelley**. That people are still thinking in terms of religious toleration, that the majority should rule in religion, which is contradictory to the first amendment's true spirit.

The **Chairman**. Do you mean the people who answered these polls did not know what they were doing?

Reverend **Kelley**. That they were still thinking in terms of the European tradition of religious toleration, not true religious liberty.

The **Chairman**. But they were asked if they favored prayers in schools, and 80 percent of them said they did. That is the latest poll of the American people; 80 percent favor prayers in schools. Now, how do you account for that?

Mr. **Levy**. Senator, I think that the validity of those polls depends entirely upon the questions that are asked. If you ask people generally whether they favor prayer in schools, and 80 percent say yes, you may draw one conclusion. But if you ask the same people—say you polled all the Jewish people in this country. I doubt if you would get a response that 80 percent would approve of the reciting of Catholic prayers to their Jewish children. Nor do I think that 80 percent of the Catholic families in this country would approve of or say in a poll that they approved of the recitation of Jewish prayers in the public schools. And if you asked the American people whether they would like to see the establishment of a national church, I think you would get very close to 100 percent saying no. But in effect, what you have going on in the classroom is the establishment of a particular religion, when the State authorities choose what is to be recited for the children who are compelled to attend those sessions.

I do not think those polls that you cite are an accurate reflection of what the American people want——

The **Chairman**. Well, I do not know whether they are accurate or not. The only thing we know is that there have been a number of polls taken—they have been taken now for several years—and the latest polls show that 80 percent of the American people favor prayers in schools.

Mr. **Levy**. You will have to ask them what prayer.

The **Chairman**. I just want to call your attention to that.

Reverend **Bergstrom**. Senator, could I respond to that? I think if you asked me, do I favor prayer in the public schools, I would say yes—privately and individually—and that is what most Lutherans would mean if they responded to that.

There was a poll conducted by Americans United, when they spelled out exactly what the Supreme Court decisions had said, and 59 percent of the people voted that, no, they would not want it changed; they supported the present situation.

I want prayer in the schools by individuals, but when you bring them together, then there will be a difference.

The **Chairman**. Well, it is kind of strange when they also favor the constitutional amendment to put prayers in schools, isn't it? That contradicts what you just said.

Reverend **Bergstrom**. I think it explains their misunderstanding of the question, very often

The **Chairman**. Well, do you think the American people are that dumb, that they could not answer a poll to say whether they favor prayers in schools and favor a constitutional amendment to bring back prayers in schools?

Reverend **Bergstrom**. No; I am only speaking for the Lutheran Church. At our conventions, every time it has come up, we have voted to oppose any change in the Supreme Court decisions. What is done individually in polls, as I think has been said, depends a lot on the question and how it is asked.

The **Chairman**. Well, I just thought I would call your attention to those matters.

Reverend **Bergstrom**. We have seen them.

Reverend **Kelley**. We are aware.

The **Chairman**. I thank all of you for your presence here, and thank you for your testimony.

Senator East has requested that the letter from Mr. Sam T. Currin, about the Southern Baptists, be placed in the record, with a copy of the resolution. Without objection, that will be done.

[The following was received for the record:]

RALEIGH, NC, *June 27, 1983.*

Hon. STROM THURMOND,
Chairman, Committee on the Judiciary, U.S. Senate, Russell Senate Office Building, Washington, DC.

DEAR SENATOR THURMOND. As Chairman of the Southern Baptist Convention's Public Affairs Committee, I am pleased to submit for the record a copy of a resolution supporting President Reagan's proposed constitutional amendment to permit voluntary school prayer which was adopted by the Convention in June, 1982. Although I regret that I cannot appear personally before your Committee, the resolution adopted by the Southern Baptist Convention is clear in stating that Baptists favor a restoration of voluntary prayer to the public schools.

In declaring its support for the constitutional amendment, the Convention noted that school officials and lower courts have frequently misinterpreted the Supreme Court prayer decisions as a ban on voluntary prayer, thus resulting in considerable confusion on the issue. The Convention also declared that the proposed amendment does not constitute a call for government-written or government-mandated prayer. It was also recognized that for 170 years following the writing of the First Amendment, the right of prayer in public schools was a time-honored exercise and a cherished privilege.

There are more than 14 million Southern Baptists in the United States today, and the Southern Baptist Convention is this nation's largest Protestant denomination. I, therefore, thank you for considering our resolution supporting the prayer amendment during your committee's deliberations.

With best wishes, I am

Sincerely yours,

Samuel T. Currin,
Chairman, Public Affairs Committee.

Enclosure.

Resolution No. 9—On Prayer in Schools

Whereas, The first amendment to the Constitution of the United States of America clearly states that the Congress shall pass no law prohibiting the free exercise of religion, and

Whereas, The same first amendment protect us against the establishment of religion, and

Whereas, A constitutional amendment is pending wherein there is no violation of either of those inherent in the separation of church and state, and

Whereas, This proposed amendment neither requires nor restricts the vocal expression of individual or group prayer in public schools, and

Whereas, Considerable confusion as to the rights and privileges guaranteed by the Constitution with regard to prayer to schools has been engendered by the Supreme Court decisions of 1962 and 1963, and

Whereas, Public school officials and lower courts have frequently misinterpreted these Supreme Court decisions as a ban on voluntary prayer, and

Whereas, For 170 years following the writing of the First Amendment, the right of prayer in public schools was a time-honored exercise and a cherished privilege, and

Whereas, Southern Baptists historically have affirmed the right of voluntary prayer in public places, and

Whereas, The proposed constitutional amendment reads simply, "Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any state to participate in prayer," and

Whereas, This proposed amendment does not constitute a call for government-written or government-mandated prayer.

Therefore, be it *Resolved,* That we the messengers of the Southern Baptist Convention in session, June 1982, New Orleans, Louisiana, declare our support of the aforementioned proposed constitutional amendment.

Be it further *Resolved,* That we shall work continually to hold fast to our faith and to the freedoms in which we believe and by which we live.

The Chairman. Our next panel is the Moral Majority, the Freedom Council, the Christian Voice, and the Center for Judicial Studies, and if the representatives would come around from those organizations.

STATEMENT OF A PANEL, INCLUDING RICHARD B. DINGMAN, LEGISLATIVE DIRECTOR, THE MORAL MAJORITY; TED PANTALEO, EXECUTIVE DIRECTOR, THE FREEDOM COUNCIL; GARY L. JARMIN, LEGISLATIVE DIRECTOR, CHRISTIAN VOICE; AND JAMES McCLELLAN, DIRECTOR, CENTER FOR JUDICIAL STUDIES

The Chairman. Who is representing The Moral Majority?

Mr. Dingman. Senator, my name is Richard B. Dingman. I am legislative director of The Moral Majority.

The Chairman. Who is representing The Freedom Council?

Mr. Pantaleo. I am Ted Pantaleo. I am the executive director of The Freedom Council.

The Chairman. Who is representing the Christian Voice?

Mr. Jarmin. I am Gary Jarmin, legislative director of Christian Voice.

The CHAIRMAN. Who is representing the Center for Judicial Studies?

Mr. MCCLELLAN. I am James McClellan, the director of the Center for Judicial Studies.

The CHAIRMAN. We are glad to have you here. We will just start in the order in which I called them, and you may proceed.

The Moral Majority first.

STATEMENT OF RICHARD B. DINGMAN

Mr. DINGMAN. Thank you, Senator.

Mr. Chairman, I appreciate the opportunity to appear again before your committee in support of school prayer. When I last appeared on May 2, our testimony was directed only toward the President's proposal for a constitutional amendment. I understand today's hearing is intended to examine an alternative amendment centered on silent prayer.

It is our feeling that there are several legal and practical flaws in the silent prayer alternative. Most of them were outlined in my letter to you last week

One, we feel that if silent prayer is adopted as the constitutionally approved practice, we will have automatically excluded other forms of expression which have been historically permitted and which we feel should be permitted. This includes such things as invocations and benedictions at various functions, student groups voluntarily saying a blessing before their meals, the carrying of Bibles on school premises, the singing of songs related to religious holidays, et cetera. Further, approval of the right to be silent is a hollow right at best. We can already do that.

Second, we fear that some would attempt to interpret the second phrase of the first sentence of section 1 as explicitly banning the previously listed forms of religious expression, as they might be deemed to encourage a particular form of prayer or meditation.

Third, we fear that the second sentence of section 1 runs a serious risk of being misinterpreted as embracing more than just schools. If so, I can foresee possible efforts to ban all forms of religious expression in all areas of government, such as the functions of all chaplains in Federal, State and local government institutions; the motto on our money; the taking of oaths, the convening of the Supreme Court—and the list goes on and on. Such a far-reaching impact is hard to imagine, but the judicial mischief which could lead to such an impact is not hard to imagine.

Fourth, we fear the inclusion of the equal access section will produce a totally unintended result. We fully support the concept of equal access, but fear that suggesting it is a right which is not already guaranteed by the Constitution will have serious legal repercussions on relevant legal cases already in process, and will open the door to suits to shut down all existing voluntary religious programs on all campuses. Since I am not a lawyer, I cannot fully address the legal ramifications, but these are our fears, and we trust that these concerns will be thoroughly researched before any further legislative action is taken.

Fifth, and lastly, we fear the concurrent consideration of the silent prayer amendment along with the President's language virtually guarantees the political demise of the President's approach. I fear there are many Senators who personally want no amendment, but who are feeling the heat of popular support for an amendment and who would seize upon this alternative as the best of both worlds. They can tell their constituents they voted for school prayer, but know in their hearts they have not truly supported school prayer in its most popular context or format.

The President's language may have some imperfections, but we feel it is the best available to us at this time, and we urge the committee to report it alone to the floor, so the full Senate will have the opportunity to express its will on the matter.

Mr. Chairman, we sincerely commend you for your efforts to bring the matter of school prayer before the Senate, and we hope this committee will concur.

The **Chairman**. Now, as we understand your position, you favor the administration's proposal?

Mr. **Dingman**. Yes, sir.

The **Chairman**. All right. We will now hear from the Freedom Council.

STATEMENT OF TED PANTALEO

Mr. **Pantaleo**. Mr. Chairman, we believe the school prayer issue is on the cutting edge of religious liberty in our beloved Nation. I am speaking for the Freedom Council across the Nation, and I am speaking for the Christian Broadcasting Network, who is our parent organization. We feel that it needs immediate action by the U.S. Congress. We also feel that this committee in particular and its individual members deserve the respect and gratitude of the entire religious community in America, both Christians and non-Christians alike, for the committee's diligence during recent sessions of Congress in searching for an effective and acceptable answer to a problem like this.

Last year, Pat Robertson testified before this committee in favor of Senate Joint Resolution 73. We are here today to say that we still strongly endorse that amendment. It offers both an acceptable solution and an achievable goal in this matter.

We also would like to go on record that we are opposed to the so-called Hatch amendment for various reasons that I will now give.

As my colleague said, I am not an attorney either, but we have talked with many constitutional attorneys in regard to both Senate Joint Resolution 73 and the new amendment, and we feel that the new amendment misses the mark because the silent prayer provision would put a premium and an emphasis on silence for religious activities in public schools, which would jeopardize invocations, benedictions and other oral and verbal prayers. Also, silent prayer has not been ruled unconstitutional by the Supreme Court. For that reason, as it has been said many times today, the amendment is unnecessary.

The equal access provision does several things. It infers equal access to public school facilities is illegal. The Supreme Court has not ruled that. Therefore, we feel this position would generate great confusion in courts. The provision would also infer Supreme Court ruling in the *Widmar* case was incorrect.

Because of the nature of the Freedom Council's mission and ministry in this country, I work closely with Christian pastors and leaders within the Hispanic, black, oriental, and caucasion communities. By and large, we feel they would welcome the return of voluntary, vocal, student-initiated prayer in our schools. These leaders would rally their followers behind an amendment such as Senate Joint Resolution 73, as it worked its way through both houses of Congress and through our State legislatures.

These leaders and pastors could and would galvanize massive nationwide support for measures that would let our children pray again, not meditate silently, throughout our school system.

Many of our Christian leaders of varying races and cultures link the absence of school prayer in our classrooms with the devastation they have seen in public schools and throughout the land. Past experiences, however, have made them wary of quick fixes.

In closing, I would recommend that the members of this committee move away from the concept of silent meditation and back to the concept that is manifest in Senate Joint Resolution 73, namely voluntary, vocal, and student-initiated prayer.

The Freedom Council, its supporters and volunteers throughout America, the supporters of CBN, will be happy to actively support recommendations by this committee for a combination of a constitutional amendment such as Senate Joint Resolution 73 and immediate "equal access" legislation.

I thank you for the opportunity for appearing here.

The CHAIRMAN. As I understand it, your organization favors the administration proposal of voluntary prayer in schools.

Mr. PANTALEO. We really do, yes, sir.

The CHAIRMAN. All right. We will now hear from the Christian Voice.

STATEMENT OF GARY L. JARMIN

Mr. JARMIN. Mr. Chairman, I thank you for the opportunity to testify again, for the third time, and rather than repeating our views on the amendment proposed by President Reagan, suffice it to say, we have always been enthusiastic supporters of it, and we would welcome it being reported out of the Judiciary Committee.

However, we have never been opposed to offering compromise changes in this language, which we feel could be an improvement upon it. And the thrust of my testimony will be to recommend such an alternative amendment.

Before outlining an alternative amendment, however, I would like to say one word about the silent prayer amendment. First of all, as far as Christian Voice is concerned, we are not hostilely opposed to it, but at best, our position is lukewarm. However, I should add that as the director of the Project Prayer Coalition, which has over 126 national organizations and leaders as its members, I have polled most of the key organizations fighting for school prayer, and the overwhelming majority of opinion ranges from lukewarm support to outright hostility to the silent prayer amendment. In essence, the silent prayer amendment has no constituency.

Without the enthusiastic and devoted efforts of the pro-school prayer movement, we doubt that any constitutional amendment will secure two-thirds in the Senate.

Therefore, I urgently request that the committee consider some type of an amendment that would restore, at a minimum, the right to some form of vocal prayer.

Now, for more than a year, we have carefully studied and listened to the objections to Senate Joint Resolution 73. We have tried to be open-minded about it. We have discussed it with a couple of dozen Senate offices, most of them who are opposed or undecided on the issue, and we have tried to draft an amendment that we think addresses those concerns and we believe is politically viable and would achieve two-thirds in the Senate. Toward that end, we propose the following language instead of what is being considered.

The amendment would read:

> Section 1. Nothing in this Constitution shall be construed to prohibit individual or group nonsectarian prayer in public schools. No person, unit of government or school shall be required by the United States or any state to participate in such prayer, nor shall they draft the content of such prayer for use in public schools.
>
> Section 2. Nothing in this Constitution shall be construed to prohibit equal access to the use of public school facilities by voluntary student groups based on the religious content of speech.

Now, the primary objections this language is intended to overcome as follows:

First of all, sectarian prayer. Some have objected to Senate Joint Resolution 73 on the grounds that it would allow for States or school districts to prescribe the sectarian prayer which would be offensive to religious minorities. We agree that this is a legitimate concern. For example, Jewish parents may be strongly in support of their children participating in prayer, but would naturally be offended if the only prayer offered were the Lord's Prayer, or concluded with ". . . in Jesus' name, amen."

To remedy this problem, we propose two alternative phrases, one defining prayer as nonsectarian, and the other, making certain that prayer is conducted in a nondiscriminatory manner.

Now, "nonsectarian" simply means that the prayer offered in the classroom could not explicitly reflect only one particular religion or denominational viewpoint. Some have argued that there is no such thing as a nonsectarian prayer, ergo, any such prayer would be considered unconstitutional. Such an assertion is based on twisting the definition of "nonsectarian" to a unreasonable extent. I am sure Justice Brennan and others could find some Judeo-Christian dogmatism lurking in the prayer, "Now I lay me down to sleep." There is probably no prayer which is totally free of sectarian influences nor should there be. Properly interpreted, however, "nonsectarian" would simply preclude a prayer exclusive to only one particular religion or denomination. The fact that traces of sectarianism common to several different religious groups might be found in such a prayer is irrelevant.

We also would recommend language where, instead of "nonsectarian," we could add the language that the prayers be "conducted in a nondiscriminatory manner." What this simply would allow is for sectarian prayers to be offered, but would allow all other religious groups the equal opportunity to have their prayers said, as well.

Also, I believe exposing children to the religious viewpoints of others would also help to promote an attitude of religious tolerance, a positive goal which would help to underscore pluralism in our society.

Second, the other change we have made would prevent any unit of government, school district, or school to be forced to have to say a prayer mandated by their State legislature. We believe this should be a local decision. State-drafted or required prayers would not take into account the desires of parents at the local level. For example, the majority of parents in Beverly Hills may not want school prayer, whereas the majority in San Diego do. One school district may prefer vocal prayer, whereas another may prefer silent prayer. So we believe that the constitutional amendment should make sure that this local decision, the right to make this local decision, is guaranteed.

Third, we have also stated that no State can draft the content of prayer. Many conservative evangelicals do not like the idea of "Caesar" drafting prayers, and we agree. However, this language would not prevent a school board from approving a prayer for recitation in the classroom drafted by an interfaith commission of parents or clergymen. This also puts a burden on the community to initiate some type of prayer, if there is going to be any at all in their schools.

In our last change, we do add in the "equal access" language recommended in the Hatch proposal.

In conclusion, I would only recommend as another alternative, allowing student-initiated vocal prayer. If the majority on this committee believes that a silent prayer amendment should be adopted, we would urge them at least to consider language which would allow for student-initiated vocal prayer. Just as with silent prayer, virtually all of the arguments school prayer opponents have raised are overcome in this instance.

Most importantly, student-initiated prayer guarantees the right for vocal prayer activity. If we are a nation that will prevent a child from initiating a prayer to invoke God's blessings, then we are truly a nation of shame and totally underserving of his approbation.

Thank you, Mr. Chairman.

[The following was received for the record:]

PREPARED STATEMENT OF GARY L. JARMIN

We deeply appreciate the opportunity to again appear before the Judiciary Committee to offer our testimony on the two separate Constitutional Amendments reported out of the Subcommittee on the Constitution. We are especially grateful for the outstanding work and leadership provided by Senator Thurmond and Senator Hatch, and the diligent efforts of the Committee staff on this issue. Regardless of the outcome on these proposed Amendments, it can be said that this Committee performed professionally, fairly and thoroughly in its efforts to diagnose the importance and ramifications of restoring prayer in our public schools. The entire Senate and, especially, the American people owe this Committee its gratitude and confidence for a job well done.

We have been fortunate enough to have had the opportunity to testify on two previous occasions as regards S.J. Res. 73. Rather than repeating our views on the Amendment proposed by President Reagan, suffice it to say we have always been enthusiastic supporters of this language and would welcome it being reported out of the Judiciary Committee.

While we are basically content with this language, we have also been supportive of compromise changes which could improve upon the President's Amendment. The primary thrust of my testimony will be to recommend such an alternative Amendment which we hope this Committee will give its most urgent and thoughtful consideration.

Before outlining alternative amendments, some comments are necessary as regards the proposed silent prayer language. Christian Voice's position on the silent prayer alternative is, to put it charitably, very lukewarm. We have not nor will we likely oppose it. However, there are several problems regarding this amendment which deeply concern us. They are as follows:

First, we do not share the assumption of silent prayer supporters that this approach is politically viable. As the Director of the Project Prayer Coalition (with over 126 national leaders and organizations as members) I have discussed this alternative with most of the key organizations fighting for school prayer. The overwhelming majority of opinion ranges from lukewarm support to outright hostility. In essence, the silent prayer Amendment has no constituency. Without the enthusiastic and devoted efforts of the pro-school prayer movement, we doubt that any Constitutional Amendment will secure two-thirds in the Senate.

Second, we doubt that a mere moment of silence will best achieve the objective of restoring a defined attitude of reverence for God and directing childrens' thoughts on important spiritual precepts and principles.
True and meaningful meditation is something that requires a certain degree of spiritual maturity. Even for adults, it probably takes at least one minute for a person to clear their minds conducive to the type of concentration required for meaningful meditation. Children are especially more apt to wandering and unfocused thoughts and, consequently, are less likely to spend that one minute of silence in a manner which would be spiritually meaningful or reinforcing. It is our opinion that no Constitutional Amendment is truly worthwhile which does not restore the opportunity for vocal prayer.

Third, we fear that "enshrining" the right to silent prayer in the Constitution will, conversely, convey the impression that vocal prayer is unconstitutional. Some liberal judges have often been quite "imaginative" in their constitutional interpretations and twisting the intentions of the founding fathers. We doubt such judicial activists will consider the intentions of this Congress any more sacrosanct than they have of the Congress which originally ratified the Constitution. The silent prayer amendment could open the Pandora's box of having vocal prayers in schools which are considered constitutional (such as in commencement exercises) rendered as unconstitutional.

This fear is especially justified when one considers the language that "Neither the United States nor any State shall require any person to participate in prayer or meditation, nor shall they encourage any particular form of prayer or meditation" (emphasis added).

If interpreted out of context with the preceding sentence, we can easily envision a federal judge declaring prayers by the Chaplain of the Senate unconstitutional since he would be considered an agent of the United States. Ditto as regards the prayers offered by Chaplains in the Armed Services. We are not sanguine that clarifying the intent of this language in the Committee Report will preclude such interpretative distortions. Too many examples abound where judges have often interpreted Constitutional language in a narrow context or disregarded legislative intent.

We concede that silent prayer is surely better than none at all, i.e., the prescribed banishment of any religious expression from our public school classrooms. However, the important goal of restoring vocal prayer can and should be our primary objective. We firmly believe that compromising on the important goal of restoring vocal prayer is totally premature, undesirable and politically unnecessary. Therefore, we propose that the Committee consider other alternatives which would accomplish this goal.

-Alternative Amendment-

For more than one year Christian Voice has carefully analyzed the chief concerns raised by opponents to S.J. Res. 73. We have asked for and received the opinions and suggestions from Senators opposed to the measure as well as the input of several prominent Constitutional scholars.

We have attempted to be as open-minded and objective as possible in order to devise a Constitutional Amendment which would achieve the goal of restoring _vocal_ prayer while overcoming some of the chief objections to S.J. Res. 73. Towards that end we propose the following language which we earnestly hope this Committee will give its serious consideration:

> Section 1. Nothing in this Constitution shall be construed to prohibit individual or group nonsectarian prayer in public schools. No person, unit of government or school shall be required by the United States or any State to participate in such prayer, nor shall they draft the content of such prayer for use in public schools.
>
> Section 2. Nothing in this Constitution shall be construed to prohibit equal access to the use of public school facilities by voluntary student groups based on the religious content of speech.

The objections to S.J. Res. 73 which this proposed alternative intends to overcome are as follows:

1. _Sectarian Prayers_- Some have objected to S.J. Res. 73 on the grounds that it would allow for States or school districts to prescribe a sectarian prayer which would be offensive to religious minorities. We agree that this is a legitimate concern. For example, Jewish parents may be strongly in support of their children participating in prayer but would naturally be offended if the _only_ prayer offered was the Lord's Prayer or concluded with "in Jesus' name, Amen."

To remedy this problem we propose two alternative phrases: (1) defining prayer as _nonsectarian_ (as in the above proposal); or (2) making certain that prayer is conducted in a _nondiscriminatory manner_.

Nonsectarian- This definition simply means that the prayer offered in a classroom could not explicitly reflect only _one_ particular religion or denominational viewpoint. For example, the Lord's Prayer could not be offered since it is exclusively a Christian prayer. In addition, we find that historically many of the prayers offered in classrooms were nonsectarian as in the case of the Board of Regents prayer in New York and, more recently, the Alabama prayer which is currently being challenged in the courts.

Some have argued that there is no such thing as a nonsectarian prayer, ergo, any such prayer would be considered unconstitutional. Such an assertion is based on twisting the definition of "nonsectarian" to an unreasonable extent. I'm sure Justice Brennan and others could find some Judeo-Christian dogmatism lurking in the prayer "Now I lay me down to sleep..." There is probably no prayer which is totally free of sectarian influences, nor should there be. Properly interpreted, however, nonsectarian would simply preclude a prayer exclusive to only one particular religion or denomination. The fact that traces of sectarianism common to several different religious groups might be found in such a prayer is irrelevant.

Nondiscriminatory Manner- One other approach in making certain no particular religion or sect is promoted over another would be to allow all religious groups the opportunity to offer their own prayers.

The Constitutional Amendment could read:

> Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools provided the opportunities for and conduct of such prayer is conducted in a nondiscriminatory manner.

This language could allow for sectarian prayers to be offered, such as the Lord's Prayer, but would also guarantee members of other religions could have their own prayer offered if they requested such an opportunity. The methodology of implementing such prayer exercises would be easily managed by school boards, parents and clergymen formulating a plan for the conduct of such prayers. Exposing children to the religious viewpoints of others would also help to promote an attitude of religious tolerance--a positive goal which would help to underscore pluralism in our society.

2. Local Decision- In addition to stating no person shall be required to participate in prayer, we have also included any unit of government or school. This would prevent a State legislature from requiring all of its school districts or schools to have prayers offered in the classroom. State drafted or required prayers would not take into account the desires of parents at the local level. For example, the majority of parents in Beverly Hills may not want school prayer whereas the majority in San Diego do. One school district may prefer vocal prayer whereas another may perfer silent prayer. Even the content of the vocal prayer will likely vary from school district to school district depending on the religious composition of students.

We can also anticipate that some school districts may wish to experiment with different types or forms of prayer before settling on the one they find the most satisfactory. State drafted or mandated prayers would make this important experimental process extremely difficult, if not impossible.

This language also guarantees the right of each school the option to not participate if it so chooses or to use a different prayer than that approved by the local school board. This would also enhance the rights of parents to have a greater influence in the decision making process regarding any prayer activity.

3. State Drafting of Prayers- We have also stated that no State (including school boards, teachers or other government employees) can draft the content of prayers. Many conservative evangelicals do not like the idea of "Caesar" drafting prayers. We agree. However, this language would not prevent a school

board from approving a prayer for recitation in the classroom drafted by an interfaith commission of parents and/or clergymen. This also puts the burden on the community to initiate some type of prayer if there is going to be any at all in their schools.

4. Equal Access- The section two language also solves the "equal access" problem (this is also in the Thurmond-Hatch alternative). We think this is a wise decision. If Congress is going to amend the Constitution to resolve the prayer problem, it only makes sense that it should resolve the equal access problem at the same time.

This would also guarantee the equal access right by giving it the weight of Constitutional law rather than a statute which would be subject to different judicial interpretations.

-Student Initiated Prayer-

As we have already stated, Christian Voice would much perfer that this Committee report out the President's language or something similar to the alternative language outlined above. Should the majority of this committee prefer a silent prayer Amendment, however, we would strongly recommend that it consider a language change which would allow for some form of vocal, student initiated prayer. The silent prayer amendment could be amended to read:

> Nothing in this Constitution shall be construed to prohibit individual or group silent prayer or meditation, or student initiated vocal prayer.

We believe opponents of school prayer will be hard pressed to argue against the right of any student to voluntarily offer their own prayer. Just as with silent prayer, virtually all of the arguments school prayer opponents have raised are overcome in this instance. For example, there would be no requirement for prayer, no state drafting or sponsorship of the content of such prayer and virtually no "peer" pressure to participate.

Also, no one can argue about the degree of the "meaningfulness" of such prayer--if it comes from the heart of a student it is certainly meaningful to that person if to no one else.

Most importantly, student initiated prayer guarantees the right for vocal prayer activity. If we are a nation that will prevent a child from initiating a prayer to invoke God's blessings, then we are a nation of shame and totally undeserving of His approbation. As our Lord Jesus Christ said: "For whoever is ashamed of me and my words, of him will the Son of man be ashamed when he comes in his glory and the glory of the Father and of the holy angels." (Luke 9:26).

The CHAIRMAN. The question has arisen as to whether it would be meaningless to have a nonsectarian prayer.

Mr. JARMIN. Well, I believe the fundamental goal of prayer in a classroom—1 minute of prayer, which would be the case—the principal goal is to reinforce the value of reverence for God and to invoke God's guidance. And we can argue all day long about what is meaningful or meaningless prayer, and I do not think it is fair to say that any prayer is meaningless which invokes God's blessing. So I think if you have a nonsectarian prayer which accomplishes that goal, then it is certainly meaningful, at least to that extent, and I believe is what the purpose of school prayer is to achieve.

The CHAIRMAN. The question has arisen, if it is truly nonsectarian, would you use God's name?

Mr. JARMIN. Yes, of course. If you do not, then it is not prayer. You are just making a philosophical statement.

The CHAIRMAN. Well, wouldn't that be objectionable to Buddhists and Hindus?

Mr. JARMIN. Well, I think that you would have to go to the local community, let all the religious groups who wish to participate in putting together a religious interfaith commission to decide what kind of prayer they find acceptable, and let them do that. In fact, this underscores one of my most chief concerns about all the remarks that have been made. Somehow, I get the impression that only we, in our divine wisdom here in Washington, DC, or a majority of five Judges on the Supreme Court, can tell people what they think is best for them. And I think the people are smart enough, intelligent enough, and have the wisdom to decide that for themselves.

The CHAIRMAN. I believe your first preference is the administration's proposal; is that right?

Mr. JARMIN. My first preference would be the administration's proposal, but if that is not accepted by this committee, I would recommend that it at least consider some language which allows for a voluntary, vocal prayer expression. If you do not have that in the constitutional amendment, then I would agree with virtually everybody beforehand that it is not worthwhile amending the Constitution to achieve that goal.

The CHAIRMAN. Thank you very much.

Now we will hear from the Center for Judicial Studies.

STATEMENT OF JAMES McCLELLAN

Mr. McCLELLAN. I thank you, Senator, for this opportunity to testify on Senate Joint Resolution 73 and other proposed constitutional amendments before you that are designed to restore school prayer.

My statement should be attributed to me alone, and does not necessarily represent the views of anyone associated with the Center for Judicial Studies. The Center, in fact, is a nonprofit educational foundation that promotes constitutional and judicial reform, and it takes no position on legislation before the Congress. I mention my affiliation with the Center solely for purposes of identification.

Let me say at the outset, Mr. Chairman, that our Nation owes you a debt of gratitude for the leadership that you bave given this Congress in the effort to restore school prayer. I express my appreciation also to Senator Hatch, the distinguished chairman of the Subcommittee on the Constitution, and to the other members of the Judiciary Committee who have sought to bring God back into the classroom. This is a noble enterprise that surely has the blessings and the support of an overwhelming majority of the American people.

Before turning to the merits of these amendments, let me also assure the committee that I strongly favor school prayer and am persuaded that the Supreme Court's decision in *Engel* v. *Vitale* is based upon a profound misunderstanding of the meaning and purpose of the establishment clause. Recently, I had the opportunity to be called as an expert witness in the landmark case of *Jaffre* v. *Board of Commissioners of Mobile County,* in which Federal District Judge Brevard Hand ruled that Federal courts do not even have jurisdiction over cases involving prayers in the public schools. Challenging the Supreme Court's interpretation of the first amendment, Judge Hand held that neither the 1st nor the 14th amendment was ever intended to apply the establishment clause to the States, and that the function of the establishment clause was to guarantee to each individual that Congress would not impose a national religion and to assure each State that it would be free to define the meaning of religious establishment under its own constitution and laws

In reaching his decision that prayers offered by Alabama schoolteachers were therefore not unconstitutional, Judge Hand relied extensively not only on my testimony before the court, but also on my constitutional writings that were submitted as evidence. For the record, and with this committee's permission, I would like to include Judge Hand's opinion, along with my prepared statement, because it accurately reflects, in considerable detail, my own constitutional views on the subject.

The CHAIRMAN. Without objection, that will be done.

Mr. McClellan. More significantly, I believe that the committee will find Judge Hand's opinion to be especially helpful in its study of the problem, because it suggests that a narrowly drawn amendment limited to the issue of prayer falls short of our constitutional needs.

At bottom, there are really only two issues before this committee. The first is whether an amendment to the Constitution restoring school prayer is either necessary or wise. The second is whether these proposed amendments now under consideration offer a satisfactory solution to the mischief that has been caused by the Supreme Court's distortion of the establishment clause. It is difficult to avoid the conclusion that a principled response calls into question the wisdom of these amendments as they are presently drawn.

Senate Joint Resolution 73 as you know, has been introduced at the request of the administration. This proposed constitutional amendment relating to school prayer is the byproduct, however, of an arcane, widely discredited interpretation of Congress' powers under article III of the Constitution, that was formally adopted by the Justice Department last year. In a letter dated May 6, 1982, to you, the chairman, Senator Thurmond, concerning the constitutionality of the Helms prayer bill, Attorney General William French Smith indicated that Congress lacks the authority to limit the Federal court's jurisdiction in cases involving prayer in the schools. The unwritten assumption in the Attorney General's letter was that Congress' only means of restoring prayer is the amendment process.

Although Attorney General Smith acknowledged that "the question of the limits of Congress' authority under the exception clause is an extraordinarily difficult one" on which "thoughtful and respected authorities have come to conclusions which differ," he insisted that Congress may not constitutionally make exceptions to Supreme Court jurisdiction which would intrude upon the "core functions" of the Court as an independent and equal branch in our system of separation of powers.

This "core function" theory embraced by the Attorney General has no standing in the Supreme Court, of course, and has never been accepted by a single member of the entire Federal judiciary in American constitutional history. It is traceable, rather, to a remark in Prof. Henry Hart's famous socratic dialog, written in 1953, and is presented not as an established precedent but as an arguable proposition.

Prof. Leonard Ratner is now the principal and practically only advocate of this position. He argues that statutory restrictions on the Court's appellate jurisdiction undermine the "essential constitutional functions of the Court to maintain the supremacy and uniformity of Federal law," an unpersuasive argument as applied to prayer in the schools, since one of the major purposes of the "establishment" clause was to prevent uniformity and allow the States to go their own way.

What are the merits of the "core function" theory? Prof. Martin Redish, who has written at length on the subject, concludes that "The major difficulty with the 'essential functions' theory is that it finds no basis in either the language or history of the Constitution." It is, he concludes, "little more than constitutional wishful thinking."

Prof. Paul Bator, now the Deputy Solicitor General of the United States, asserts that the "arguments which would place serious limits on the power of Congress to make exceptions to the appellate jurisdiction of the Supreme Court are not persuasive."

Prof. Ralph Rossum, Special Assistant to the Director of the Bureau of Statistics of the Justice Department, writes in a recent article for the William and Mary Law Review that "nothing in the text of the exceptions clause or in any Supreme Court opinion addressing this subject suggests that Congress' power under Article III, Section 2 is limited to making 'inessential' exceptions. The essential function theory makes the Court itself the final arbiter of the extent of its powers." This interpretation, as Prof. William Van Alstyne of Duke University has observed, "is hardly in keeping with the spirit of checks and balances of our Constitution."

Speaking at a recent conference of the Roscoe Pound American Trial Lawyers' Foundation in Charlottesville, VA, Prof. Gerald Gunther presented an exhaustive critique of the essential or core function theory, concluding:

> In the end, I continue to agree with Professor Herbert Wechsler, my colleague when I was at Columbia, who saw 'no basis' for Article III restraints on Congressional exercises of its "exceptions" power, even those motivated by hostility, to the decisions of the Supreme Court. Wechsler insisted, indeed, that the arguments for internal restraints were themselves antithetical to the plan of the Constitution for the courts, which was quite simply that Congress would decide from time to time how far the Federal judicial institutions should be used within the limits of the Federal judicial power. Much of the "essential functions" theory of Professor Ratner and Attorney General Smith strike me as confusing wisdom and constitutionality.

In sum, Mr. Chairman, the Attorney General has actually recommended to this committee that it refrain from exercising its statutory powers under article III, and that it proceed instead with a constitutional amendment. This may be good politics for the administration, but it is bad constitutional law for Congress and the Nation This committee should be wary of gratuitous and questionable interpretations of Congress' powers by the executive branch, particularly when such interpretations lack precedent or broad support, and seek to nullify the only meaningful power that Congress has to control the Federal judiciary under our check and balance system. The situation calls for an assertion of congressional power in the form of legislation, a course of action which should be preferred to the formal amendment process whenever possible.

In my judgment, therefore, the committee should explore the possibility of restricting the jurisdiction of the Federal courts before resorting to an amendment that will impliedly place the stamp of constitutionality on the Supreme Court's usurpations of State authority under the first amendment.

One modest approach is that suggested by S. 785, the Helms prayer bill. Another, more comprehensive solution is that presented in the Judicial Reform Act offered by Senator East.

These considerations aside, the administration's proposed amendment is inherently defective. In the first place, it is too narrowly drawn, and fails to address the additional problems that have arisen as a result of the Supreme Court's misreading of the "establishment" clause. It is silent, for example, about the question of

Bible reading in the schools, about the many issues that plague our State and local officials concerning such diverse activities as nativity plays and the use of school property for meetings by church groups or student religious organizations; and about the maze of confusion that has followed in the wake of the Supreme Court's decisions involving State aid to parochial schools in the form of transportation and educational materials.

There are today virtually hundreds of cases being litigated under the "establishment" clause in the Federal courts, most of which would be unaffected by this amendment.

Second, the amendment is premature——

The CHAIRMAN. Let me ask you this, since your time is up. Could you put the rest of your statement in the record?

Mr. McCLELLAN. Certainly, Senator. Thank you.

Let me just make one final remark. I do suggest that if there is to be an amendment to the Constitution, that it be a federalism amendment, which would cure all the ills and would not single out just the problem of prayer in the schools. My prepared statement addresses this question.

The CHAIRMAN. Thank you very much.

[The unread portion of James McClellan's prepared statement and additional material follows:]

PREPARED STATEMENT OF JAMES McCLELLAN

Secondly, the amendment is premature. The *Jaffre* case is now on appeal to the Supreme Court, and there is always the possibility—however remote—that it will uphold Judge Hand's decision. Most members of the Burger Court, we should bear in mind, have not had an opportunity to rule on the question raised in that case as to whether the framers and backers of the fourteenth amendment intended to incorporate the establishment clause into the word "liberty" of the due process clause and apply it to the States.

Finally, and in many ways most significantly, the prayer amendment is an abuse of the amending process. An amendment to the Constitution, like the Constitution itself, should deal with broad considerations of power, not with single manifestations of the exercise of that power. It should focus on changing the way a power is exercised, not on the particular results of its exercise. Amending the Constitution in piecemeal fashion for a single issue reason weakens the Constitution, and promises to reduce it to the condition of an unwieldly code. If we are to amend the Constitution to restore prayer, why not an additional 20 or more amendments to take care of Bible-reading, abortion, busing, the death penalty and ad infinitum?

As Prof. Gary McDowell has wisely observed, "The issue of greatest importance is not overruling *Engel* v. *Vitale* (1962) * * * but moving to restructure the exercise of judicial power in such a way that it remain truer to constitutional text and intention." As he further notes, "what lies at the heart of the problem is the deterioration of the principle of federalism as a source of restraint on the exercise of power." In other words, the source of our difficulty is the Supreme Court's incorporation theory, which has brought about wholesale usurpations of State power and subverted the original purpose of not merely the establishment clause, but the entire first amendment and most provisions of the Bill of Rights. "It is striking," observes Professor McDowell, that what was intended to limit the power of the national government over the domestic affairs of the states, the Bill of Rights, has been so turned on its head as to be one of the major avenues whereby national power runs roughshod over the States."

If there must be an amendment to the constitution, Mr. Chairman, let it be a principled, federalism amendment that deals with the problem at the level of cause rather than effect, and restricts the power that is responsible for the problems this Committee is attempting to resolve.

Ishmael JAFFREE; Jamael Aakki Jaffree, Makeba Green, and Chioke Saleem Jaffree, infants, by and through their best of friend and father, Ishmael Jaffree, Plaintiffs,

v.

The BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY; Dan C. Alexander, Dr. Norman Berger, Hiram Bosarge, Norman G. Cox, Ruth F. Drago, and Dr. Robert Gilliard, in their official capacities as members of the Board of School Commissioners of Mobile County; Dr. Abe L. Hammons, in his official capacity as Superintendent of the Board of Education of Mobile County; Annie Bell Phillips, individually and in her official capacity as principal of Morningside Elementary School; Julia Green, individually and in her official capacity as a teacher at Morningside Elementary School; Betty Lee, individually and in her official capacity as principal of E.R. Dickson Elementary School; Charlene Boyd, individually and in her official capacity as a teacher at E.R. Dickson Elementary School; Emma Reed, individually and in her official capacity as principal of Craighead Elementary School; Pixie Alexander, individually and in her official capacity as a teacher at Craighead Elementary School, Defendants.

Civ. A. No. 82–0554–H.

United States District Court,
S.D. Alabama, S.D.

Jan. 14, 1983.

Complaint challenged certain Alabama statutes including the "Prayer Law." The District Court, Hand, Chief Judge, held

decision. Tr. 10.

that: (1) First Amendment in large part was guarantee to states which insured that states would be able to continue whatever church-state relationship existed in 1791, and (2) because establishment clause of First Amendment does not prohibit the state from establishing a religion, prayers offered by the teachers in the case were not unconstitutional.

Action dismissed.

Stay Granted, — U.S. —, 103 S.Ct. 842, 74 L.Ed.2d 924.

1. Declaratory Judgment 🔑272

Declaratory judgment statutes afford no subject-matter jurisdiction to federal courts. 42 U.S.C.A. § 1983; 28 U.S.C. (1976 Ed.) § 1343(3, 4); 28 U.S.C.A. §§ 1331, 2201, 2202; U.S.C.A. Const.Amends. 1, 14.

2. Federal Courts 🔑219

The 1871 civil rights statute does not provide substantive rights, and section providing for original jurisdiction in the district courts over actions to recover damages or to secure equitable relief under any act of Congress providing for protection of civil rights, including right to vote, does not afford subject-matter jurisdiction to federal court over claims brought under 1871 civil rights statute. 42 U.S.C.A. § 1983; 28 U.S.C.A. §§ 2201, 2202; 28 U.S.C. (1976 Ed.) § 1343(4).

3. Civil Rights 🔑13.1

Purpose of 1871 civil rights statute was to provide remedy to vindicate rights afforded by federal bill of rights when persons acting under color of state law violated those rights, and remedy would not be implied under First and Fourteenth Amendments where Congress had expressly afforded remedy. U.S.C.A. Const.Amends. 1, 14; 42 U.S.C.A. § 1983.

4. Federal Courts 🔑244

Although complaint did not allege that subject-matter jurisdiction was vested in court under general, federal-question jurisdictional statute, subject-matter jurisdiction of civil rights was vested under such provision. 42 U.S.C.A. § 1983; 28 U.S.C. (1976 Ed.) § 1343(3, 4); 28 U.S.C.A. §§ 1331, 2201, 2202; U.S.C.A. Const.Amends. 1, 14.

5. Constitutional Law 🔑84

First Amendment in large part was guarantee to states which insured that states would be able to continue whatever church-state relationship existed in 1791. U.S.C.A. Const.Amend. 1.

6. Constitutional Law 🔑84

Psychological pressure which naturally flows anytime a state takes an official position on an issue does not make establishment unconstitutional, in that Constitution does not protect people from feeling uncomfortable, and tender years are no exception. U.S.C.A. Const.Amend. 1.

7. Constitutional Law 🔑84

Establishment clause, as ratified in 1791, was intended only to prohibit federal government from establishing national religion. U.S.C.A. Const.Amend. 1.

8. Constitutional Law 🔑84

Function of establishment clause was to guarantee to each individual that Congress would not impose national religion and to grant to each state that states were free to define meaning of religious establishment under their own constitutions and laws. U.S.C.A. Const.Amend. 1.

9. Constitutional Law 🔑274(3)

Fourteenth Amendment did not incorporate establishment clause of First Amendment against the states. U.S.C.A. Const.Amends. 1, 14.

10. Constitutional Law 🔑19

Only proper approach to interpretation of Constitution is to interpret it as its drafters and adoptors intended. U.S.C.A. Const. Art. 4, § 2, cl. 1; Amends. 1–8, 14.

11. Constitutional Law 🔑10

Amendment of Constitution through judicial fiat is both unconstitutional and illegal. U.S.C.A. Const.Amends. 1–8, 14.

12. Courts 🔑90(6)

In most types of cases it is more important that applicable rule of law be settled than that it be settled right, and this general rule holds even where court is persuaded that it has made serious error of interpretation in cases involving statute, but, in cases involving Federal Constitution, where correction through legislative action is practically impossible, court should be willing to examine earlier precedent and to overrule it if court is persuaded that earlier precedent was wrongly decided. U.S.C.A. Const. Amends. 1–8, 14.

13. Schools 🔑165

Prayers offered by teachers in state school were not unconstitutional. U.S.C.A. Const.Amends. 1, 14.

Ronnie L. Williams, Mobile, Ala., for plaintiffs.

Robert H. Mudd, Jr., Robert C. Campbell, III, Mobile, Ala., for defendants Board of School Commissioners.

Fob James, III, pro se.

Charles S. Coody, Counsel Director, Div. of Legal Services, Dept. of Education, Montgomery, Ala., for defendants Tyson, Creel, Cherry, Higginbotham, Poole, Martin, Allen and Roberts, Bob Sherling, Mobile, Ala., for intervening defendants.

MEMORANDUM OPINION

HAND, Chief Judge.

Prelusion

If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way in which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.

Farewell Address by
George Washington
reprinted in R. Berger,
Government by Judiciary 299 (1977).

Ishmael Jaffree, on behalf of his three (3) minor children, seeks declaratory and injunctive relief. In the original complaint Mr. Jaffree sought a declaration from the Court that certain prayer activities initiated by his children's public school teachers violated the establishment clause of the first amendment to the United States Constitution. He sought to have these prayer activities enjoined.

A trial was held on the merits on November 15–18, 1982. After hearing the testimony of witnesses, considering the exhibits, discovery, stipulations, pleadings, briefs, and legal arguments of the parties, the Court enters the following findings of fact and conclusions of law.

I. *Findings of Fact*

Ishmael Jaffree is a citizen of the United States, a resident of Mobile County, Alabama, and has three (3) minor children attending public schools in Mobile County, Alabama: Jamael Aakki Jaffree, Makeba Green and Chioke Saleem Jaffree.

Defendants, Annie Bell Phillips (principal) and Julia Green (teacher) are employed at Morningside Elementary School, where Jamael Aakki Jaffree attended school during the 1981–82 school year. Defendants Betty Lee (principal) and Charlene Boyd (teacher) are employed at E.R. Dickson Elementary School where Chioke Saleem Jaffree attended during the 1981–82 school year. Defendants, Emma Reed (principal) and Pixie Alexander (teacher) are employed at Craighead Elementary School where Makeba Green attended school during the 1981–82 school year. Each of these defendants is sued individually and in their official capacity. Each of the schools is part of the system of public education in Mobile County, Alabama.

Dan Alexander, Dr. Norman Berger, Hiram Bosarge, Norman Cox, Ruth F. Drago and Dr. Robert Gilliard are members of the Board of School Commissioners of Mobile County, Alabama. As commissioners, each of these defendants collectively is charged by the laws of the State of Alabama with administering the system of public instruction for Mobile County, Alabama. These defendants are sued only in their official capacity.

Dr. Abe L. Hammons is the Superintendent of Education for Mobile County, Alabama. Defendant Hammons has direct supervisory responsibilities over all principals, teachers and other employees of the Mobile County Public School System. This defendant is sued only in his official capacity.

Defendant Boyd, as early as September 16, 1981, led her class at E.R. Dickson in singing the following phrase:

God is great, God is good,
Let us thank him for our food,
bow our heads we all are fed,
Give us Lord our daily bread.
Amen!

The recitation of this phrase continued on a daily basis throughout the 1981–82 school year.

Defendant Boyd was made aware on September 16, 1981 that the minor plaintiff, Chioke Jaffree, did not want to participate in the singing of the phrase referenced above or be exposed to any other type of religious observances. On March 5, 1982, during a parent-teacher conference, Ms. Boyd was told by Chioke's father that he did not want his son exposed to religious activity in his classroom and that, in Mr. Jaffree's opinion, the activity was unlawful. Again, on March 11, 1982, Ms. Boyd received a handwritten letter from Mr. Jaffree which again advised her that leading her class in chanting the referenced phrase was unlawful. This letter further advised Ms. Boyd that if the practice was not discontinued that he would take further administrative and judicial steps to see that it was. Finally, Ms. Boyd was made aware of the contents of a letter drafted by Mr. Jaffree, dated May 10, 1982, which had been sent to Superintendent Hammons complaining about the prayer activity in Ms. Boyd's classroom. Notwithstanding Mr. Jaffree's protestations, the recitation of the prayer continued.

Defendant Lee learned on March 8, 1982, that Mr. Jaffree had complained about the prayer activities which were being conducted in defendant Boyd's classroom. Ms. Lee directly spoke with Mr. Jaffree on March 11, 1982, and learned from him that he was opposed to the prayer activities in Ms. Boyd's class and that he felt the same to be unconstitutional. On the same day, Ms. Lee called Mr. Larry Newton, Deputy Superintendent, who informed her that the prayer activity in Ms. Boyd's class could continue on a "strictly voluntary basis."

Defendant Pixie Alexander has led her class at Craighead in reciting the following phrase:

God is great, God is good,
Let us thank Him for our food.

Further, defendant Pixie Alexander had her class recite the following, which is known as the Lord's Prayer:

> Our Father, which art in heaven, hallowed be Thy name. Thy kingdom come. Thy will be done on earth as it is in heaven. Give us this day our daily bread and forgive us our debts as we forgive our debtors. And lead us not into temptation but deliver us from evil for thine is the kingdom and the power and the glory forever. Amen.

The recitation of these phrases continued on a daily basis throughout the 1981–82 school year.

Defendant Pixie Alexander learned on May 24, 1982, that Mr. Jaffree had complained, through a letter dated May 10, 1982, to defendant Hammons, about her leading her class in the above-referenced prayer activity. After Ms. Alexander learned of Mr. Jaffree's May 10, 1982 letter, she continued to lead her class in reciting the referenced phrases.

Ms. Green admitted that she frequently leads her class in singing the following song:

For health and strength and daily food,
we praise Thy name, Oh Lord.

This activity continued throughout the school year, despite the fact that Ms. Green had knowledge that plaintiff did not want his child exposed to the above-mentioned song. *See* defendant Green's response to plaintiffs' Interrogatories Nos. 21, 22, 50 and 51.

Upon learning of the plaintiffs' concern over prayer activity in their schools, defendants Reed and Phillips consulted with teachers involved, however, neither defendant advised or instructed the defendant teachers to discontinue the complained of activity.

Prior to the 1981–82 school year, defendants Reed, Phillips, Boyd, and to a lesser extent, Green, each knew the Board of School Commissioners of Mobile County had a policy regarding religious activity in public schools. However, not one of the teachers sought or received advice from the board or the superintendent prior to the plaintiffs' initial complaint regarding whether their classroom prayer activities were consistent with the policy.

The policy on religious instruction adopted by the Board of School Commissioners of Mobile County reads as follows:

> RELIGIOUS INSTRUCTION
>
> Schools shall comply with all existing state and federal laws as these laws pertain to religious practices and the teaching of religion. This policy shall not be interpreted to prohibit teaching about the various religions of the world, the influence of the Judeo-Christian faith on our society, and the values and ideals of the American way of life.

School attendance is compulsory in the State of Alabama. Alabama Code § 16–28–3 (1975).

The complaint in this case was later amended to include allegations against Governor Fob James and various state officials. The claims against the state officials were severed, Fed.R.Civ.P. 21, and they are the subject of a separate order which the Court entered today.

This recitation of the findings of fact is not intended to be an all-inclusive statement of the facts as they were produced in this case. Because of the following opinion the Court is of the impression that the facts above-recited constitute a sufficient recitation for deciding this case. However, in the event there is a disagreement with the conclusions reached by this Court, the Court does not desire to be precluded from a further recitation of appropriate fact as may be essential to further conclusions in the case. Examples of what the Court alludes to is the factual bases for consideration of the questions of freedom of speech, whether or not secular humanism is in fact a religion, and the propriety of the free exercise of religion.

II. *Conclusions of Law*

A. *Subject-Matter Jurisdiction*

[1, 2] This action is brought under 42 U.S.C. § 1983.[1] The complaint alleges that the subject-matter jurisdiction of the Court "is evoked pursuant to Title 28, Sections 1343(3) and (4), and Sections 2201 and 2202 of the United States Code." *See* Complaint at 2 (filed May 28, 1982). Neither of the two amended complaints add anything to this jurisdictional allegation.[2]

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[1] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[2] Initially, it should be noted that neither 28 U.S.C. §§ 2201 nor 2202 afford any subject-matter jurisdiction to a federal court as the complaint alleges. These sections provide only a remedy.

> The operation of the Declaratory Judgment Act is procedural only. By passage of the Act, Congress enlarged the range of remedies available in the federal courts but it did not extent their subject-matter jurisdiction. Thus there must be an independent basis of jurisdiction, under statutes equally applicable to actions for coercive relief, before a federal court may entertain a declaratory judgment action.

10 C. Wright and A. Miller, *Federal Practice and Procedure* § 2766, 841 (1973) (footnotes omitted).

[3, 4] The complaint alleges that rights guaranteed to the plaintiffs under the first and fourteenth amendments have been violated.[3] The subject-matter jurisdiction of a federal court over a claim arising under 42 U.S.C. § 1983 rests upon 28 U.S.C. § 1343(3). While the complaint does not allege that subject-matter jurisdiction is vested in the court under the general, federal-question jurisdictional statute, 28 U.S.C. § 1331, certainly subject-matter jurisdiction is vested under that provision since a federal district court has "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States," 28 U.S.C. § 1331, exclusive of the amount-in-controversy. Thus, the Court concludes that it has subject-matter jurisdiction over the claims alleged by the plaintiffs.[4]

B. *School-Prayer Precedent*

The United States Supreme Court has previously addressed itself in many cases to the practice of prayer and religious services in the public schools. As courts are wont to say, this court does not write upon a clean slate when it addresses the issue of school prayer.

Viewed historically, three decisions have lately provided general rules for school prayer. In *Engel v. Vitale,* 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962), *Abington v. Schempp,* 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963), and *Murray v. Curlett,* 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963), the Supreme Court established the basic considerations. As stated, the rule is that "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach." *Everson v. Board of Education,* 330 U.S. 1, 18, 67 S.Ct. 504, 513, 91 L.Ed. 711 (1947) (per Black, J.).

In *Engel v. Vitale* parents of public school students filed suit to compel the board of education to discontinue the use of an official prayer in the public schools. The prayer was asserted to be contrary to the beliefs, religions, or religious practices of the complaining parents and their children. In *Engel* the board of education, acting in its official capacity under state law, directed the principals to cause the following prayer to be said aloud by each class at the beginning of the day in each homeroom: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." 370 U.S. at 422, 82 S.Ct. at 1262. This prayer was adopted by the school board because it believed the prayer would help instill the proper moral and spiritual training needed by the students.

Likewise, 28 U.S.C. § 1343(4) does not afford subject-matter jurisdiction to a federal court over claims brought under 42 U.S.C. § 1983. Section 1343(4) affords subject-matter jurisdiction to the federal court only over those claims which are brought under "any Act of Congress providing for the protection of civil rights . . . ." "Standing alone, § 1983 clearly provides no protection for civil rights since . . . § 1983 does not provide any substantive rights at all." *Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600, 618, 99 S.Ct. 1905, 1916, 60 L.Ed.2d 508 (1979).

[3] In fact, the complaint alleges that "[t]his cause of action arises under the First and Fourteenth Amendments to the United States Constitution . . . ." *See* Complaint at 2. This Court has previously explained that no implied cause of action exists under either the first or fourteenth amendments, at least when the first amendment is applied to persons acting under color of state law. The very purpose for enacting 42 U.S.C. § 1983 was to provide a remedy to vindicate the rights afforded by the federal Bill of Rights when persons acting under color of state law violated those rights. It would be incongruous to imply a remedy where Congress has expressly afforded a remedy. *See Strong v. Demopolis City Board of Education,* 515 F.Supp. 730, 732 n. 1 (S.D.Ala.1981) (per Hand, J.).

[4] "[T]he existence of a claim for relief under § 1983 is 'jurisdictional' for purposes for invoking 28 U.S.C. § 1343, even though the existence of a meritorious constitutional claim is not similarily required in order to invoke jurisdiction under 28 U.S.C. § 1331. *See Bell v. Hood,* 327 U.S. 678, 682 [66 S.Ct. 773, 776, 90 L.Ed. 939] (1946); *Mt. Healthy [City School District v. Doyle],* 429 U.S. 274, 278–79 [97 S.Ct. 568, 571–72 (1977).]" *Monell v. Department of School Services,* 436 U.S. 658, 716, 98 S.Ct. 2018, 2048, 56 L.Ed.2d 611 (1978).

The parents argued that the school board violated the establishment clause of the first amendment when it directed that this prayer be recited in the public schools. The first amendment provides, in relevant part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...." U.S. Const. amend. 1. The Supreme Court found "that by using its public school system to encourage recitation of the Regent's prayer, the State of New York ha[d] adopted a practice wholly inconsistent with the Establishment Clause." *Id.* at 422, 82 S.Ct. at 1262. The Court found this prayer to be a religious activity. The prayer constituted "a solemn avowal of divine faith and supplication for the blessing of the Almighty. The nature of such prayer has always been religious ...." *Id.* at 424–25, 82 S.Ct. at 1264–65. The Court noted that "[i]t [wa]s a matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America." *Id.* at 425, 82 S.Ct. at 1264. Therefore, according to the Court, the prayer "breache[d] the constitutional wall of separation between Church and State." *Id.*

Citing historical documents, the Court observed that

> [b]y the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the danger of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services .... The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support, or influence the kinds of prayer the American people can say—that the people's religions must not be subjected to the pressures of government or change each time a new political administration is elected to office. Under the Amendment's prohibition against governmental establishment of religion, *as reinforced by the prohibitions of the Fourteenth Amendment, government in this country, be it state or federal, is* without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity.

Id. at 429–30, 82 S.Ct. at 1266 (emphasis added).

The assertion by the Court that the establishment clause of the first amendment applied to the states was unaccompanied by any citation to authority. This conclusion was reached supposedly upon its examination of historical documents.

In dissent, Mr. Justice Stewart argued that the majority in *Engel* misinterpreted the first amendment. As Mr. Justice Stewart saw it, an official religion was not established by letting those who wanted to say a prayer say it. To the contrary, Mr. Justice Stewart thought "that to deny the wish of those school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation." *Id.* at 445, 82 S.Ct. at 1274–75. As Mr. Justice Stewart saw the problem, our country is steeped in a history of religious tradition. That religious tradition is reflected in countless practices common in our institutions and governmental officials. For instance, the United States Supreme Court has always opened each day's session with the prayer "God save the United States and this Honorable Court." *Id.* at 446, 82 S.Ct. at 1275. Each President of the United States has, upon assuming office, sworn an oath to God to properly execute his presidential duties. Our national anthem, "The Star-Spangled Banner," contains these verses:

> Blest with the victory and peace, may the heav'n rescued land
> Praise the Pow'r that hath made
> and preserved us a nation!

> Then conquor we must, when our
> cause it is just,
> And this be our motto "In God is
> our Trust."

Id. at 449, 82 S.Ct. at 1277. The Pledge of Allegiance to the Flag contains the words "one Nation *under God,* indivisible, with liberty and justice for all." *Id.* (emphasis in original). Congress added this in 1954. Mr. Justice Stewart believed that the Regent's prayer in New York had done no more than "to recognize and to follow the deeply enriched and highly cherished spiritual traditions of our Nation—traditions which came down to us from those who almost two hundred years ago avowed their 'firm Reliance on the Protection of divine Providence' when they proclaimed the freedom and independence of this brave new world." *Id.* at 450, 82 S.Ct. at 1277.

Following the decision by the Supreme Court in *Engel,* the Court decided *Abington v. Schempp* and *Murray v. Curlett.* In *Abington,* a state law in Pennsylvania required that

> [a]t least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian.

374 U.S. 205, 83 S.Ct. 1562. The Schempp family, husband and wife and two of their three children, brought suit to enjoin enforcement of this statute. The Schempps contended that their rights under the fourteenth amendment of the United States Constitution were being violated.

Each morning at the Abington Senior High School between 8:15 a.m. and 8:30 a.m., while students were attending their homerooms, selected students would read ten verses from the Holy Bible. These Bible readings were broadcast to each room in the school building. Following the Bible readings the Lord's Prayer was recited. As with the Bible readings, the Lord's Prayer was broadcast throughout the building. Following the Bible readings and the Lord's Prayer, a flag salute was performed. Participation in the opening exercises, as directed by the Pennsylvania statute, was voluntary.

No prefatory statement, no questions, no comments, and no explanations were made at or during the exercises. Students and parents were advised that any student could absent himself from the classroom or, should he elect to remain, not participate in the exercises.

In *Murray v. Curlett,* the Board of School Commissioners of Baltimore City adopted a rule which "provided for the holding of opening exercises in the schools of the city, consisting primarily of 'reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer.'" 374 U.S. at 211, 83 S.Ct. at 1565. An athiest, Mrs. Madalyn Murray, objected to the Bible reading and the recitation of the Lord's Prayer. After receiving the objection the board specifically provided that the Bible reading and the use of the Lord's Prayer should be conducted without comment and that any child could be excused from participating in the opening exercises or from attending them upon the written request of his parent or guardian.

Because of the similarity of the issues in both the *Abington* case and the *Murray* case the Supreme Court consolidated both cases on appeal and decided them together. The Court recognized that "[i]t is true that religion has been closely identified with our history and government.... 'The history of man is inseparable from the history of religion. And ... since the beginning of that history many people have devoutly believed that "More things are wrought by prayer than this world dreams of."'" *Abington School District v. Schempp,* 374 U.S. at 212–13, 83 S.Ct. at 1566 (quoting *Zorach v. Clauson,* 343 U.S. 306, 313, 72 S.Ct. 679, 683, 96 L.Ed. 954 (1952)). Notwithstanding this recognition by the Court that the early history of this country, together with the history of man, was inseparable from religion the Court found the Bible reading and the recitation of the Lord's Prayer to be an unconstitutional abridgement of the first amendment prohibition that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...." U.S. Const. amend. I.

The Court noted that the first amendment prohibited more than governmental preference of one religion over another. Rather, the first amendment was intended " 'to create a complete and permanent separation of the spheres of religious activity in civil authority by comprehensively forbidding every form of public aid or support for religion.' " *Id.* 374 U.S. at 217, 83 S.Ct. at 1568 (quoting *Everson v. Board of Education,* 330 U.S. 31–2, 67 S.Ct. 519 (1947)). The Court reviewed several of its precedents which touched on the establishment of religion, and concluded that " '[t]here cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the "free exercise" of religion and an "establishment" of religion are concerned the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute.' " *Id.* 374 U.S. at 219–20, 83 S.Ct. at 1569–70 (quoting *Zorach v. Clauson,* 343 U.S. 306, 312, 72 S.Ct. 679, 683, 96 L.Ed. 954 (1952)). The Court in *Abington* reasoned from its own precedent rather than independently reviewing the historical foundation of the first and the fourteenth amendments. The Court held that the Bible reading and the recitation of the Lord's Prayer in both cases were religious exercises. The "rights," *id.* at 224, 83 S.Ct. at 1572, of the plaintiffs were being violated. The religious character of the Bible reading and the recitation of the Lord's Prayer were not mitigated by the fact that students were allowed to absent themselves from their homerooms upon request of their parents. "The breach of neutrality that is today a trickling stream may all too soon become a raging torrent ...." *Id.* at 225, 83 S.Ct. at 1573.

The principles enunciated in *Engel v. Vitale, Abington v. Schempp,* and *Murray v. Curlett* have been distilled to this: "To pass muster under the Establishment Clause, the governmental activity must, first, reflect a clearly secular governmental purpose; second, have a primary effect that neither advances nor inhibits religion; and third, avoid excessive government entanglement with religion. *Committee for Public Education & Religious Liberty v. Nyquist,* 413 U.S. 756, 773, 93 S.Ct. 2955, 2965, 37 L.Ed.2d 948 (1973)." *Hall v. Board of School Commissioners,* 656 F.2d 999, 1002 (5th Cir.1981). "If a statute [or official administrative directive] violates *any* of these three principles, it must be struck down under the Establishment Clause." *Stone v. Graham,* 449 U.S. 39, 101 S.Ct. 192, 193, 66 L.Ed.2d 199 (1980) (holding that a Kentucky statute requiring posting of copy of Ten Commandments on walls of each public school classroom in state had pre-eminent purpose which was plainly religious in nature, and statute was thus violative of establishment clause and that avowed secular purpose was not sufficient to avoid conflict with first amendment; emphasis added).

Indeed, in this circuit, prayer in public schools is per se unconstitutional. "Prayer is an address of entreaty, supplication, praise, or thanksgiving directed to some sacred or divine spirit, being, or object. That it may contemplate some wholly secular objective cannot alter the inherently religious character of the exercise." *Karen B. v. Treen,* 653 F.2d 897, 901 (5th Cir.1981).

In sum, under present rulings the use of officially-authorized prayers or Bible readings for motivational purposes constitutes a direct violation of the establishment clause. Through a series of decisions, the courts have held that the establishment clause was designed to avoid any official sponsorship or approval of religious beliefs. Even though a practice may not be coercive, active support of a particular belief raises the danger, under the rationale of the Court, that state-approved religious views may be eventually established.

Although a given prayer or practice may not favor any one sect, the principle of neutrality in religious matters is violated under these decisions by any program which places tacit government approval upon religious views or practices. While the purpose of the program might be neutral or secular, the effect of the program or practice is to give government aid in support of the advancement of religious beliefs. Thus the programs are held invalid without any consideration as to whether they excessively entangle the state in religious affairs.

In contrast, the Supreme Court has permitted the use of the Bible in a literature course where the literary aspects of the Bible are emphasized over its religious contents. *Abington School District v. Schempp,* 374 U.S. 203, 225, 83 S.Ct. 1560, 1573, 10 L.Ed.2d 844 (1963). So long as the study does not amount to prayer or the advancement of religious beliefs, a teacher may discuss the literary aspects of the Bible in a secular course of study. Finally, the Supreme Court permits religious references in official ceremonies, including some school exercises, on the basis that these references are part of our secularized traditions and thus will not advance religion. *Engel v. Vitale,* 370 U.S. 421, 435 n. 21, 82 S.Ct. 1261, 1269 n. 21, 8 L.Ed.2d 601 (1962).

In the face of this precedent the defendants argue that school prayers as they are employed are constitutional. The historical argument which they advance takes two tacks. First, the defendants urge that the first amendment to the U.S. Constitution was intended only to prohibit the *federal government* from establishing a *national* religion. Read in its proper historical context, the defendants contend that the first amendment has no application to the states. The intent of the drafters and adoptors of the first amendment was to prevent the establishment of a national church or religion, and to prevent any single religious sect or denomination from obtaining a preferred position under the auspices of the federal government.

The corollary of this historical intent, according to the defendants, was to allow the states the freedom to address the establishment of religions as an individual prerogative of each state. Stated differently, the election by a state to establish a religion within its boundaries was intended by the framers of the Constitution to be a power reserved to the several states.

Second, the defendants argue that whatever prohibitions were initially placed upon the federal government by the first amendment that those prohibitions were not incorporated against the states when the fourteenth amendment became law on July 19, 1868. The defendants have introduced the Court to a mass of historical documentation which all point to the intent of the Thirty-ninth Congress to narrowly restrict the scope of the fourteenth amendment. In particular, these historical documents, according to the defendants, clearly demonstrate that the first amendment was never intended to be incorporated through the fourteenth amendment to apply against the states. The Court shall examine each historical argument in turn.

In the alternative, the defendant-intervenors argue that if the first amendment does bar the states from establishing a religion then the Mobile County schools have established or are permitting secular humanism, *see infra* note 41 (discussion of secular humanism), to be advanced in the curriculum and, being a religion, it must be purged also. Such a purge, maintain the defendant-intervenors, is nigh impossible because such teachings have become so entwined in every phase of the curriculum that it is like a pervasive cancer. If this must continue, say the defendant-intervenors, the only tenable alternative is for the public schools to allow the alternative religious views to be presented so that the students might better make more meaningful choices.

C. *First Amendment as Forbidding Absolute Separation*[5]

" '[T]he real object of the [F]irst amendment was not to countenance, much less to advance Mohammedanism, or Judaism, or infidelity, by prostrating Christianity, but to exclude all rivalry among *Christian* sects and to prevent any *national* ecclesiastical establishment which would give to an hierarchy the exclusive patronage of the *national* government.' "[6] The establishment clause was intended to apply only to the federal government. Indeed when the Constitution was being framed in Philadelphia in 1787 many thought a bill of rights was unnecessary. It was recognized by all that the federal government was the government of enumerated rights. Rights not specifically delegated to the federal government were assumed by all to be reserved to the states. Anti-Federalists, however, insisted upon a Bill of Rights as additional protection against federal encroachment upon the rights of the states and individual liberties. Excerpted testimony of James McClellan at 5–6 (trial testimony).

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[5] At the start the Court should acknowledge its indebtedness to several constitutional scholars. If this opinion will accomplish its intent, which is to take us back to our original historical roots, then much of the credit for the vision lies with Professor James McClellan and Professor Robert L. Cord. Their work and the historical sources cited in their work have proven invalu-

The federalists, who were the proponents of the Constitution, acceded to the demand of the Anti-Federalists for a Bill of Rights since, in the opinion of all, nothing in the Bill of Rights changed the terms of the original understanding of the federal convention. It was thought by all that the Bill of Rights simply made express what was already understood by the convention: namely, the federal government was a government of limited authority and that authority did not include matters of civil liberty such as freedom of speech, freedom of the press, and freedom of religion. *Id.* at 8–13.

The prohibition in the first amendment against the establishment of religion gave the states, by implication, full authority to determine church-state relations within their respective jurisdictions. "Thus the establishment clause actually had a dual purpose: to guarantee to each *individual* that Congress would not impose a national religion, and to each *state* that it was free to define the meaning of religious establishment under its own state constitution and laws. The federal government, in other words, simply had no authority over the states respecting the matter of church-state relations." [7]

At the beginning of the Revolution established churches existed in nine of the colonies. Maryland, Virginia, North Carolina, South Carolina, and Georgia all shared Anglicanism as the established religion common to those colonies. *See* McClellan, *supra* note 6, at 300. Congregationalism was the established religion in Massachusetts, New Hampshire, and Connecticut. New York, on the other hand, allowed for the establishment of Protestant religions.[8] Three basic patterns of church-state relations dominated in the late eighteenth century. In most of New England there was the quasi-establishment of a specific Protestant sect. Only in Rhode Island and Virginia were all religious sects disestablished. "But all of the states still retained the Christian religion as the foundation stone of their social, civil and political institutions. Not even Rhode Island and Virginia renounced Christianity, and both states continued to respect and acknowledge the

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able to the Court in this opinion. *See* R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (1982); P. McGuigan & R. Rader, *A Blueprint for Judicial Reform* (eds. n.d.); J. McClellan, *Joseph Story and the American Constitution,* 118–159 (1971) (Christianity and the Common Law).

[6] McClellan, The *Making and the Unmaking of the Establishment Clause,* in *Blueprint for a Judicial Reform* 295 (P. McGuigan & R. Rader eds. n.d.) (quoting J. Story, III, *Commentaries on the Constitution* § 1871 (1833) (emphasis added))

[7] *Id.*

[8] *Id.* at 300. Professor McClellan documents in great detail the political struggle which raged through the various colonies during the Revolution and afterwards to disestablish certain religions throughout the colonies. The establishment of one religion over another in the respective colonies was purely a political matter. The political strength of the various followers determined which religion was established. Like any other political decision, when the political strength of the minorities reached that of the majority, the state disestablished what had formerly been the majority religion. *See e.g., id.* at 301–308.

Christian religion in their system of laws."[9] At the time the Constitution was adopted ten of the fourteen states refused to prefer one Protestant sect over another. Nonetheless, these states placed Protestants in a preferred status over Catholics, Jews, and Dissenters.[10]

The pattern of church-state relations in new states entering the Union after 1789 did not differ substantially from that in the original fourteen. By 1860—and the situation did not radically change for the next three quarters of a century—the quasi-establishment of a specific Protestant sect had everywhere been rejected; quasi-establishment of the Protestant religion was abandoned in most but not all of the states; and the quasi-establishment of the Christian religion still remained in some areas. A new pattern of church-state relations, the multiple or quasi-establishment of all religions in general, i.e., giving all religious sects a preferred status over disbelievers (the No Preference Doctrine) became widespread throughout most of the Union. Thus at the turn of the century, for example, no person who denied the existence of God could hold office in such states as Arkansas, Mississippi, Texas, North Carolina, or South Carolina.[11]

[5] The first amendment in large part was a guarantee to the states which insured that the states would be able to continue whatever church-state relationship existed in 1791. Excerpted testimony of James McClellan at 13 (from trial).

D. *Washington, Madison, Adams, and Jefferson*

The drafters of the first amendment understood the first amendment to prohibit the federal government only from establishing a national religion. Anything short of the outright establishment of a national religion was not seen as violative of the first amendment. For example, the federal government was free to promote various Christian religions and expend monies in an effort to see that those religions flourished. This was not seen as violating the establishment clause. R. Cord, *Separation of Church and State* 15 (1982).

The intent of the framers of the first amendment can be understood by examining the legislative proposals offered contemporaneously with the debate and adoption of the first amendment. For instance, one of the earliest acts of the first House of Representatives was to elect a chaplain. James Madison was a member of the congressional committee who recommended the chaplain system. On May 1, 1789 the House elected as chaplain, the Reverend William Linn. $500.00 was appropriated from the federal treasury to pay his salary. Even though the first amendment did not become part of the Constitution until 1791, had James Madison believed in the absolute separation of Church and State as some historians have attributed to him, James Madison would certainly have objected on this principle alone to the election of a chaplain.[12] At the Constitutional Convention on June 28, 1787 Dr. Benjamin Franklin suggested that a morning prayer might speed progress during the debates. Franklin told the Convention and its President, George Washington, that he had lived a long time. The longer he lived the more persuaded he was "*that God Governs in the affairs of men.*"[13] Franklin "therefore beg[ged] leave to move—that henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business, and that one or more of the clergy of this City be requested to officiate in that Service—" [14] Franklin's motion was not adopted for political reasons. Alexander Hamilton and others thought that the motion might have been proper at the beginning of the convention but that if the motion were adopted during the convention the public might believe that the convention was near failure. For this reason, which was wholly political, the issue was resolved by adjournment without any vote being taken.[15]

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[9] *Id.* at 307.

[10] *Id.*

[11] *Id.* at 311. Professor McClellan cites numerous examples in which the states required adherence to a Christian religion. For instance, witnesses were considered competent to testify only if they affirmed a belief in the existence of a Christian God. *Id.*

[12] R. Cord, *supra* note 5, at 23.

[13] R. Cord, *supra* note 5, at 24 (quoting *Debates in the Federal Convention of 1787* as reported by James Madison, *Documents Illustrative of the Formation of the Union of the American States* (Washington, D.C.: Government Printing Office, (1927) 295–96 (emphasis in original)).

Presidential proclamations, endorsed by Congressman James Madison when Washington was President, dealing with Thanksgiving, fasting, and prayer are all important in understanding Madison's views on the proper role between church and state.[16] Congress proposed a joint resolution on September 24, 1789, which was intended to allow the people of the United States an opportunity to thank Almighty God for the many blessings which he had poured down upon them. The resolution requested that President George Washington recommend to the citizens of the United States a day of public thanksgiving and prayer. Congress intended that the people should thank Almighty God for affording them an opportunity to establish this country.[17] This proclamation was submitted to the President the very day after Congress had voted to recommend to the states the final text of what was to become the first amendment to the United States Constitution.[18] As President, Madison issued four prayer proclamations. Excerpted testimony of James McClellan at 19.

Thomas Jefferson is often cited along with James Madison as a person who was absolutely committed to the separation of church and state. The historical record, however, does not bear out this conclusion.

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[14] *Id.* at 24–25.

[15] *Id.*

[16] The views of James Madison are often cited by those who insist upon absolute separation between church and state. Madison was one of the drafters of the first amendment. An uncritical, cursory examination of some of Madison's writings would lead one to the conclusion that Madison favored absolute separation between church and state. However, to reach this conclusion is to misunderstand the views of Mr. Madison.

As Professor Cord explains in his book, Madison was concerned only that the federal government should not establish a national religion. Nondiscriminatory aid to religion and support for various Christian religions was not viewed by Madison as unlawful. *See* R. Cord, *supra* note 5, at 25–26 (examining drafts of the establishment clause submitted by Madison).

[17] Professor Cord explains in great detail the circumstances surrounding this presidential proclamation. *See* R. Cord, *supra* note 5, at 27–29.

[18] Professor Cord discusses in detail a document which Madison wrote late in his life known as the *Detached Memoranda*. Some historians have taken the *Detached Memoranda* as a blanket condemnation of religious proclamations issued by Presidents Jefferson, Madison, and Jackson. From this, some historians argue that James Madison believed that absolute separation was mandated by the establishment clause. The Supreme Court has relied upon the *Detached Memoranda* to justify its position of absolute separation in *Abington School District v. Schempp,* 374 U.S. 203, 225 (1963) ("[I]n the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.' ").

Professor Cord suggests that the *Detached Memoranda* reflected nothing more than a shift in Madison's views as he grew older. The *Detached Memoranda* was written long after Madison had left office and long after the first amendment had been drafted. R. Cord, *supra* note 5, 29–36.

The explanation of Professor Cord that Madison is an old man, no longer in office, who regretted some of his past actions, is, to the Court, reasonable. Not all historical facts can easily be squared. Professor Cord emphasizes his point by analogizing to something which former President Nixon might write upon reflecting on his tenure as president. It would be odd, hypothesizes Professor Cord, if Mr. Nixon were to publish a book in his later years which concluded that taping conversations, without all parties being aware of the recording, is morally wrong and clearly a flagrant violation of the constitutional right to privacy. It would be nonsense, in the view of Professor Cord, for a Nixon biographer to conclude that Richard Nixon believed that the surreptitious tapings of conversations in the Oval Office were immoral and unconstitutional. R. Cord, *supra* note 5, at 36. Similarly, it is faulty to judge what Madison believed to be the scope of the establishment clause at the time he drafted the clause by looking to views expressed late in his life when there are numerous expressions of his intent contemporaneous with the period in which the establishment clause was drafted.

While Jefferson undoubtedly believed that the church and the state should be separate, his actions in public life demonstrate that he did not espouse the absolute separation evidenced in the modern decisions by the United States Supreme Court. For example, on October 31, 1803, President Jefferson proposed to the United States Senate a treaty with the Kaskaskia Indians which provided that federal money was to be used to support a Catholic priest and to build a church for the ministry of the Kaskaskia Indians. The treaty was ratified on December 23, 1803. As Professor Cord points out in his book,[19] President Jefferson could have avoided the explicit appropriation of funds to support a Catholic priest and a Catholic church by simply leaving a lump sum in the Kaskaskia treaty which could have been used for that purpose. However, President Jefferson was not at all reluctant—for ought that appears on the historical record—to specifically appropriate money for a Catholic mission.

Unlike Presidents Washington, Madison, and Adams, when Jefferson was President he broke with the tradition of issuing executive religious proclamations. In Jefferson's view the establishment clause and the federal division of power between the national government and the states foreclosed executive religious proclamations. While refusing to issue executive religious proclamations, President Jefferson recognized that "no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the General Government. It must then rest with the States, as far as it can be in any human authority."[20] Thus, of the first four Presidents, all of whom were close to the adoption of the Federal Constitution and the first amendment, only President Jefferson did not issue executive religious proclamations, and only President Jefferson thought that executive religious proclamations were not constitutional.

But even President Jefferson signed into law bills which provided federal funds for the propagation of the gospel among the Indians.[21] Based upon this historical record Professor Cord concludes that Jefferson, even as President, did not interpret the establishment clause to require complete independence from religion in government.

In sum, while both Madison and Jefferson led the fight in Virginia for the separation of church and state, both believed that the first amendment only forbade the establishment of a state religion by the *national* government. "Jefferson was neither at the Constitutional Convention nor in the House of Representatives that framed the First Amendment. The two Presidents who were at the Convention, Washington and Madison, and the President who framed the initial draft of the First Amendment in the House of Representatives, James Madison, issued Thanksgiving Proclamations."[22] The Court agrees with the studied conclusions of Dr. Cord that "it should be clear that the traditional interpretation of Madison and Jefferson is historically faulty if not virtually unfounded ...."[23]

One thing which becomes abundantly clear after reviewing the historical record is that the founding fathers of this country and the framers of what became the first amendment never intended the establishment clause to erect an absolute wall of separation between the federal government and religion. Through the chaplain system, the money appropriated for the education of Indians, and the Thanksgiving proclamations, the federal government participated in secular Christian activities. From the beginning of our country, the high and impregnable wall which Mr. Justice Black referred to in *Everson v. Board of Education,* 330 U.S. 1, 18, 67 S.Ct. 504, 513, 91 L.Ed. 711 (1947), was not as high and impregnable as Justice Black's revisionary literary flourish would lead one to believe.

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[19] R. Cord, *supra* note 5, at 37–39.

[20] R. Cord, *supra* note 5, at 40 (quoting Letter to a Presbyterian Clergyman (1808)).

[21] Professor Cord chronicles the federal support provided to the Moravian Brethren at Bethlehem in Pennsylvania. The function of the Brethren was to civilize the Indians and to promote Christianity. First passed on July 27, 1787, the resolution supporting the Brethren was supported by every President, including Thomas Jefferson. The legislation supporting the Brethren was sectarian in character. Professor Cord reads this history to conclude that had this sort of interaction between church and state been thought to be unconstitutional then certainly the early Congresses and Presidents would not have authorized expenditure of federal money. R. Cord, *supra* note 5, at 39–46.

[22] R. Cord, *supra* note 5, at 47.

[23] *Id.*

Yet, despite all of this historical evidence, only last month the Supreme Court wrote that the purpose of the first amendment is

> twofold: to foreclose state interference with the practice of religious faiths, and to foreclose the establishment of a state religion familiar in other Eighteenth Century systems. Religion and government, each insulated from the other, could then coexist. *Jefferson's idea of a "wall," see Reynolds v. United States,* 98 U.S. (8 Otto) 145, 164 [25 L.Ed. 244] (1878), *quoting* Reply from Thomas Jefferson to an address by a committee of the Danbury Baptist Association (January 1, 1802), *reprinted in* 8 Works of Thomas Jefferson 113 (Washington ed. 1861), *was a useful figurative illustration* to emphasize the concept of separateness. Some limited and incidental entanglement between church and state authority is inevitable in a complex modern society, *see, e.g., Lemon v. Kurtzman,* 403 U.S. 602, 614 [91 S.Ct. 2105, 2112, 29 L.Ed.2d 745] (1971); *Walz v. Tax Commission,* 397 U.S. 664, 670 [90 S.Ct. 1409, 1412, 25 L.Ed.2d 697] (1970), *but the concept of a "wall" of separation is a signpost.*

Larkin v. Grendel's Den, Inc., —— U.S. ——, ——, 103 S.Ct. 505, 510, 74 L.Ed.2d 297 (1982) (emphasis added). Enough is enough. Figurative illustrations should not serve as a basis for deciding constitutional issues.

[6] For this Court, Professor Robert Cord, *see supra* note 5, irrefutably establishes that Thomas Jefferson's address to the Danbury Baptist Association cannot be relied upon to support the conclusion that Jefferson believed in a *wall* between church and state. "By this phrase Jefferson could only have meant that the 'wall of separation' was erected 'between Church and State' in regard to possible federal action such as a law establishing a national religion or prohibiting the free exercise of worship." *Id.* at 115. Overall the conduct of Thomas Jefferson was consistent with the conclusion that he believed, like all the other drafters of the Constitution and the Bill of Rights, that the states were free to establish religions as they saw fit.[24]

E. *First Amendment as Applied to the States*

[7, 8] As has been seen up to this point the establishment clause, as ratified in 1791, was intended only to prohibit the federal government from establishing a national religion. The function of the establishment clause was two-fold. First, it guaranteed to each individual that Congress would not impose a national religion. Second, the establishment clause guaranteed to each state

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[24] Since the states were historically free to establish a religion it follows that some irritation by non-believers or those in the religious minority was a necessary consequence of establishment. The complaint alleges that "[a]ll of the minor Plaintiffs are exposed to ostracism from their peer group class members if they do not participate in these daily devotional activities." Complaint at 5. The children "all have suffered and continue to suffer severe emotional distress from being forced to participate, via peer group pressure, in devotional observances orchestrated by the defendants." *Id.* at 7. This psychological pressure naturally flows anytime a state takes an official position on an issue. It does not make an establishment unconstitutional. For example, laissez-faire industrialists feel coerced when a state adopts tough environmental laws. Unemployed workers feel pressure from peer groups when the unemployed worker takes advantage of a state labor law which allows him to cross a union picket line to break a strike. Someone, somewhere, feels coerced or pressured anytime the state takes a position. The Constitution, however, does not protect people from feeling uncomfortable. A member of a religious minority will have to develop a thicker skin if a state establishment offends him. Tender years are no exception.

that the states were free to define the meaning of religious establishment under their own constitutions and laws.

The historical record clearly establishes that when the fourteenth amendment was ratified in 1868 that its ratification did not incorporate the first amendment against the states. The debates in Congress at the time the fourteenth amendment was being drafted, the re-election speeches of the various members of Congress shortly after the passage by Congress of the fourteenth amendment, the contemporaneous newspaper stories reporting the effect and substance of the fourteenth amendment, and the legislative debates in the various state legislatures when they considered ratification of the fourteenth amendment indicate that the amendment was not intended to apply the establishment clause against the states because the fourteenth amendment was not intended to incorporate the federal Bill of Rights (the first eight amendments) against the states.

At the beginning the Court should acknowledge its indebtedness to Professor Charles Fairman, then a professor of law in Political Science at Stanford University, for the scholarly article which he published in 1949.[25] Professor Fairman examined in detail the historical evidence which Mr. Justice Black relied upon in *Adamson v. California,* 332 U.S. 46, 47, 67 S.Ct. 1672, 1673, 91 L.Ed. 1903 (1947), where Mr. Justice Black concluded that the historical events that culminated in the adoption of the fourteenth amendment demonstrated persuasively that one of the chief objects of the fourteenth amendment was to make the Bill of Rights applicable to the states.[26]

1. *Debates*

The paramount consideration in defining the scope of any constitutional provision or legislative enactment is to ascertain the intent of the legislature. The intention of the legislature may be evidenced by statements of the leading proponents.[27] If statements of the leading proponents are found, those statements are to be regarded as good as if they were written into the enactment. "The intention of the lawmaker is the law." *Hawaii v. Mankichi,* 190 U.S. 197, 212, 23 S.Ct. 787, 788, 47 L.Ed. 1016 (1903).

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[25] Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 Stan.L.Rev. 5 (1949).

[26] Mr. Justice Black spent nearly twenty years mulling over the criticisms leveled by Professor Charles Fairman. Finally, he had this to say:

> What I wrote [in *Adamson v. California,* 332 U.S. 46, 47 [67 S.Ct. 1672, 1673, 91 L.Ed. 1903] (1947),] in 1947 was the product of years of study and research. My appraisal of the legislative history [which surrounded the adoption of the fourteenth amendment and upon which Mr. Fairman relied so heavily] followed 10 years of legislative experience as a Senator of the United States, not a bad way, I suspect, to learn the value of what is said in legislative debates, committee discussions, committee reports, and various other steps taken in the course of passage of bills, resolutions, and proposed constitutional amendments. My Brother Harlan's objections to my *Adamson* dissent history, like that of most of the objectors, relies most heavily on a criticism written by Professor Charles Fairman and published in the Stanford Law Review. 2 Stan.L.Rev. 5 (1949). I have read and studied this article extensively, including the historical references, and am compelled to add that in my view it has completely failed to refute the inferences and arguments that I suggested in my *Adamson* dissent. Professor Fairman's "history" relied very heavily on what was "not" said in the state legislatures that passed on the Fourteenth Amendment. Instead of relying on this kind of negative pregnant, my legislative experience has convinced me that it is far wiser to rely on what "was" said, and most importantly, said by the men who actually sponsored the Amendment in the Congress. I know from my years in the United States Senate that it is to men like Congressman Bingham, who steered the amendment through the House, and Senator Howard, who introduced it in the Senate, that members of Congress look when they seek the real meaning of what is being offered. And they vote for or against a bill based on what the sponsors of that bill and those who oppose it tell them it means. The historical appendix to my "Adamson" dissent leaves no doubt in my mind that both its sponsors and those who opposed it believed the Fourteenth Amendment made the first eight amendments of the Constitution (the Bill of Rights) applicable to the states.

Duncan v. Louisiana, 391 U.S. 145, 165–66, 88 S.Ct. 1444, 1455–56, 20 L.Ed.2d 491 (1968) (Black, J., dissenting).

Charles Fairman "conclusively disproved Black's contention, at least, such as the weight of the opinion among disinterested observers." A. Bickel, *The Least Dangerous Branch* 102 (1962). Along with Alexander Bickel, Professor Raoul Berger agrees that Charles Fairman's analysis was right on the mark. R. Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment,* 137 n. 11 (1977).

> Looking back, what evidence [i]s there . . . to sustain the view that Section 1 was intended to incorporate Amendments I to VIII? [C]ongressman Bingham . . . did a good deal of talking about "immortal bill of rights" and one spoke of "cruel and unusual punishments." Senator Howard, explaining the new privileges and immunities clause, said that it included the privileges and immunities of Article IV, Section 2—"whatever they may be"—and also "the personal rights guarantied [*sic*] and secured by the first eight amendments . . . ." That is all. The rest of the evidence bore in the opposite direction, or was indifferent. Yet one reads in Justice Black's footnotes that, [*Adamson v. California,* 332 U.S. 46, 72 n. 5 [67 S.Ct. 1672, 1686 n. 5, 91 L.Ed. 1903] (1947)],
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> > A comprehensive analysis of the historical origins of the Fourteenth Amendment, Flack, The Adoption of the Fourteenth Amendment (1908), 94, concludes that "Congress, the House and the Senate, had the following objects and motives in view for submitting the first section of the Fourteenth Amendment to the States for ratification:
> >
> > 1. To make the Bill of Rights (the first eight Amendments) binding upon, or applicable to, the States.
> > 2. To give validity to the Civil Rights Bill.
> > 3. To declare who were citizens of the United States.
>
> We have been examining the same materials as did Flack, and have quoted far more extensively than he. How can he on that record reach the conclusion that Congress proposed by Section 1 to incorporate Amendments I to VIII?

Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights,* 2 Stan.L.Rev. at 65–66 (1949). Professor Flack explained that the incorporation was based upon remarks of Congressman Bingham and Senator Howard at the time the Thirty-ninth Congress voted upon the fourteenth amendment. Only those two said anything which could be construed as suggesting the result reached by Justice Black and the modern Supreme Court decisions.

Throughout the debates in the House over the meaning of the fourteenth amendment Professor Fairman shows convincingly that Congressman Bingham had no clear concept of what exactly would be accomplished by the passage of the fourteenth amendment. The explanations offered by Congressman Bingham to his colleagues were inconsistent and contradictory.[28]

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[27] For example, Professor Raoul Berger cites several cases which recite this common principle of construction. *See e.g., Wright v. Vinton Branch,* 300 U.S. 440, 463, 57 S.Ct. 556, 562, 81 L.Ed. 736 (1937); *Wisconsin Railroad Commission v. C.B. & Q. RR. Co.,* 257 U.S. 563, 589, 42 S.Ct. 232, 238, 66 L.Ed. 371 (1922). *See* R. Berger, *supra* note 26, at 136–37 & 137 n. 13.

[28] Professor Fairman has quoted exhaustively from the Congressional Globe. The various speeches of Congressman Bingham made in support of the fourteenth amendment are quoted in detail. See Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 Stan.L.Rev. 5, 24–25 (1949).

The analysis of Professor Fairman is attacked vigorously by William Crosskey, then a professor of law at the University of Chicago Law School. Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority* 22 U.Chi.L.Rev. 1 (1954). Crosskey quotes at length from the Bingham article and from the *Congressional Globe* in an effort to discredit the explanation offered the historical facts by Professor Bingham.

The debate between the two scholars was pitched. Much of Crosskey's analysis consisted of little more than *ad homineum* attacks on Professor Fairman. The attacks were answered in a reply article written by Professor Fairman. Fairman, *A Reply to Professor Crosskey,* 222 U.Chi.L.Rev. 144 (1954). After reading the original articles of both Fairman and Crosskey, the rebuttal of Fairman, and many other arti-

Together with Congressman Bingham's statements which suggested incorporation were remarks by Senator Howard. Senator Howard spoke with more preciseness than Congressman Bingham. Thus, his interpretation carries much greater weight than that of Congressman Bingham. Yet, because of the circumstances under which he spoke, his statements are subject to question when held out as representative of the majority viewpoint. By sheer chance Senator Howard acted as spokesman for the joint committee when explaining the purpose of the fourteenth amendment to the Senate. The joint committee had been chaired by Senator Fessenden. Chairman Fessenden became sick suddenly and Senator Howard thus became the spokesman for the Joint Committee. "Up to this point [Senator Howard's] participation in the debates on the Civil Rights Bill and the several aspects of the Amendment had been negligible. Poles removed from Chairman Fessenden, who 'abhorred' extreme radicals, Howard . . . was 'one of the most . . . reckless of the radicals,' who had 'served consistently in the vanguard of the extreme Negrophiles.' "[29] Professor Raoul Berger notes with some sarcasm that it is odd that a radical such as Senator Howard should be taken as speaking authoritatively for a committee in which the conservatives outnumbered the radicals and where there was a strong difference of opinion between the radicals and the conservatives. R. Berger, *supra* note 26, at 147.

On May 23, 1866, Senator Howard rose in the Senate, referred to the illness of Fessenden, and stated that he would "present 'the views and the motives which influenced the committee, so far as I understand [them].' After reading the privileges and immunities listed in *Corfield v. Coryell*, [6 Fed.Cas. 546, No. 3230 (C.C.E.D.Pa.1823),] he said, 'to these privileges and immunities . . . should be added the personal rights guaranteed and secured by the first eight amendments.' That is the sum and sub-

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cles on the question, the Court is persuaded that the weight of the disinterested scholars supports the analysis of Professor Fairman. The work of Professor Crosskey impresses the Court as being designed to reach a result. Namely, Crosskey was interested in providing a constitutional basis to support the desegregation decision of the United States Supreme Court in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954). For instance, in an effort to explain a serious ambiguity in a Bingham speech, Professor Crosskey explains that the speech would make perfect sense if one assumes that Bingham had been reading directly from a text of the Constitution, that he had a copy of the document in his hand and that he was waving the copy while he spoke in Congress. "You're fudging, Professor Crosskey! You don't know that Bingham had been *reading* from the Constitution." Fairman, *A Reply to Professor Crosskey*, 22 U.Chi.L.Rev. 144, 152 (1949).

One scholar, Michael Kent Curtis, argues that Professor Raoul Berger has improperly analyzed the incorporation question by blindly following the lead of Charles Fairman and ignoring the work of William Crosskey. Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger*, 16 Wake Forest L.Rev. 45 (1980). No lesser a light than Henry M. Hart, Jr., then a professor of law at Harvard Law School, remarked that "[t]he Don Quixote of Chicago breaks far too many lances in his on-slaughts upon the windmills of constitutional history to permit detailed review of each adventure." Hart, Book Review, 67 Harv.L.Rev. 1456 (1954). While the comment was, strictly speaking, directed to a recently released book by Professor Crosskey, the thrust of the comment holds true for the scholarship of Professor Crosskey. Professor Henry Hart had little use for the typical analytical method employed by Professor Crosskey: slanderous, *ad homineum* attacks on those historical actors who supported views contrary to those which Professor Crosskey expected to find in a historical record. Professor Hart compared Professor Crosskey to Senator Joseph McCarthy from Wisconsin. *Id.* at 1475 ("In the true hit-and-run style popularized by the Senator from the adjacent state to the north, [Wisconsin being north of Illinois] Professor Crosskey, having made th[e] ugly charge [that James Madison deliberately, not inadvertently, falsified some of his notes in 1836 to suit his own purposes at that time], promises to consider in a later volume whether it is true.") Professor Hart is of the general opinion that the scholarship of Professor Crosskey amounted to little more than "a confident tone, nice printing, and an abundance of notes and appendices referring to obscure documents and esoteric word meanings." *Id.* at 1486.

[29] R. Berger, *supra* note 26, at 147 (footnotes omitted).

stance of Howard's contribution to the 'incorporation' issue." [30]

Raoul Berger notes in his analysis of the incorporation question that the remark of Senator Howard was tucked away in the middle of a long speech, that Howard was a last minute substitution for the majority chairman, that Howard was in the minority on the committee, and that after Howard was through speaking Senator Poland stated that the fourteenth amendment secured nothing beyond what was intended in the original privileges and immunities clause of Article IV Section 2. R. Berger, *supra* note 26, 148–49. Senator Doolittle followed Senator Poland with some additional remarks which were designed to reassure those whose votes had already been won in favor of passage of the fourteenth amendment that indeed the amendment was limited to known objectives, which objectives were not intended to encompass the federal Bill of Rights.

The scholarly analyses of Professors Fairman and Berger persuasively show that Mr. Justice Black misread the congressional debate surrounding the passage of the fourteenth amendment when he concluded that Congress intended to incorporate the federal Bill of Rights against the states. *See infra* p. 42–44 (discussion of Blaine Amendment). So far as Congress was concerned, after the passage of the fourteenth amendment the states were free to establish one Christian religion over another in the exercise of their prerogative to control the establishment of religions.

2. *Popular Understanding*

An examination of popular sentiment across the country reveals that the nation as a whole did not understand the adoption of the fourteenth amendment to incorporate the federal Bill of Rights against the states. Inferentially, that is to say that the people understood that each state was free to continue to support one Christian religion over another as the people of that state saw fit to do. The leading constitutional scholar upon whom Justice Black relied in *Adamson v. California,*

> Mr. Flack[,] examined a considerable number of Northern newspapers and reported (an admission against the thesis he was defending) the following observation: "There does not seem to have been any statement at all as to whether the first eight Amendments were to be made applicable to the States or not . . . ." Presumably this excluded the press reports of May 24 on Senator Howard's speech of the 23d: for the *New York Herald* and the *New York Times,* which Mr. Flack had before him, did quote in full the passage where it said that the personal rights guaranteed by the first eight amendments were among the "privileges and immunities."
>
> Other newspaper files have been examined in preparing the [article of Professor Fairman] and no instance has been found to vary what has been set out above.

Fairman, *supra* note 25, at 68 (footnotes omitted).[31]

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[30] R. Berger, *supra* note 26, at 147–48 (quoting *Congressional Globe* 2764–65).

[31] Crosskey, *Charles Fairman, "'Legislative History'" and the Constitutional Limitations on State Authority,* 22 U.Chi.L.Rev. 1 (1954). In particular, Professor Crosskey is critical of the newspaper examination conducted by Professor Fairman. By Crosskey's count, Fairman and Flack together examined ten newspapers. *Id.* at 100–101. Crosskey points out that there were nearly 5,000 newspapers in circulation in 1870. Thus, if Flack and Fairman examined only ten of these newspapers then, concludes Crosskey, the two ignored a substantial source of evidence in their inquiry. Certainly, at the least, according to Crosskey, neither Flack nor Fairman are entitled to make any conclusions about what the newspapers of the day reflected as the popular understanding of the effect of the fourteenth amendment.

The Court has studied the Crosskey criticism of Professor Fairman and rejects it. The work of the two scholars serves as the cornerstone for both camps in the debate vel non whether the fourteenth amendment was intended to incorporate the federal Bill of Rights. *Compare* R. Berger, *supra* note 26, 134–156 (rejecting incorporation of the federal Bill of Rights) *with* Curtis, *The Bill of Rights as a Limitation on State Authority: A Reply to Professor Berger,* 16 Wake Forest L.Rev. 45 (1980) (following Crosskey).

Charles Fairman quotes at length from the campaign speeches of five senators who, presumably, heard Senator Howard's speech of May 23, 1866. Not one of the senators mentioned anything about the Bill of Rights when commenting to the electorate about Section 1. Likewise, the five Republicans, including Congressman Bingham, never mentioned that the privileges and immunities clause would impose the federal Bill of Rights upon the states. Along with Professor Fairman, the Court takes the historical record to conclusively show that the general understanding of the nation at large, as illustrated by contemporaneous newspaper reports, demonstrates that the people of this country did not understand the fourteenth amendment to incorporate the establishment clause of the first amendment against the states.

3. *Campaign Speeches*

After the submission of the fourteenth amendment to the states on June 16, 1866 the members of the Thirty-ninth Congress began to busy themselves with the prospect of re-election in the fall. The statements which the members of Congress made during their campaign speeches are certainly relevant in ascertaining the intent of the Thirty-ninth Congress with regard to the scope and effect of the fourteenth amendment. All of these speeches were contemporaneous expressions of the intent of Congress. Professor Fairman provides many instances of speeches made on the campaign hustings. *See generally,* Fairman, *supra* note 25, at 68–78. None of the members of Congress indicated in their campaign speeches that the fourteenth amendment was intended to incorporate the federal Bill of Rights against the states. The general consensus with regard to the effect of the fourteenth amendment was that it covered the same ground as the Civil Rights Act of 1866. *Id.* at 72 (remarks of Senator Lyman Trumbull, the sponsor of the Civil Rights Bill).

4. *State-Legislative Debates*

The fourteenth amendment was submitted to the states for their ratification on June 16, 1866. By June, 1867, twelve legislatures had ratified the amendment. By July 28, 1868 the fourteenth amendment had been promulgated.

Professor Fairman combed the relevant legislative materials to see exactly what each state legislature thought the effect of the fourteenth amendment would be. Along with Fairman, the Court finds it important to note not only what was said but what was not said. Had the fourteenth amendment been understood to incorporate the federal Bill of Rights against the states in many instances states would have been required to make radical changes. For instance, it was frequent in many states for people to be prosecuted for felonies without an indictment from a grand jury. It was equally common for a jury of less than twelve people to sit in judgment in a felony prosecution. Some states failed to preserve the right to a jury trial and suits at common law where the amount in controversy exceeded $20.00.

The Court will not repeat Professor Fairman's analysis in each state. Only a few states need to be highlighted to convey the popular understanding of the effect of the fourteenth amendment upon the right of states to establish a religion. In New Hampshire, only five months after the promulgation of the fourteenth amendment—in December, 1868—the Supreme Court of New Hampshire had occasion to interpret a provision of the state constitution which provided that the legislature could "authorize towns, parishes, and religious societies 'to make adequate provision ... for the support and maintenance of public Protestant teachers of piety, religion, and morality.'"[32] Moreover, Article VI of the Bill of Rights from the New Hampshire Constitution encouraged "the public worship of the diety ...." The question before the Supreme Court of New Hampshire was whether certain parishioners of the First Unitarian Society of Christians in Dover could fire the preacher. The preacher had begun using text from Emerson interchangably with text from the Bible. While Wardens of the church supported the preacher, certain pew owners were outraged. The pew owners sought an injunction restraining the preacher from occupying the meeting house. The trial court granted relief.

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[32] C. Fairman, *supra* note 25 at 86 (quoting N.H. Const. art. 6 (1793)).

On appeal, in a 276-page report neither the opinion of the court nor the dissent made a single reference to the fourteenth amendment. Both opinions, however, had much to say about New Hampshire's policy in ecclesiastical matters. The opinion of the court referred to the first amendment and quoted Story's *Commentaries:*

> [T]he whole power over the subject of religion is left exclusively to the State governments, to be acted upon according to their own sense of justice and the State constitutions ....
>
> Probably at the time of the adoption of the amendment now under consideration, the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state, so far as not incompatible with the private rights of conscience and the freedom of religious worship.

Fairman, *supra* note 25, 87 (citations omitted).

As Professor Fairman notes: "[I]n December 1868—five months after the promulgation of the Fourteenth Amendment—the New Hampshire court regarded the matter of an establishment of religion as being still 'left exclusively to the Sta governments.'" *Id.*

[9] The historical record shows witho equivocation that none of the states envisioned the fourteenth amendment as applying the federal Bill of Rights against the through the fourteenth amendment. It sufficient for purposes of this case for th Court to recognize, and the Court does recognize, that the fourteenth amendme did not incorporate the establishment clause of the first amendment against the states.[33]

5. *Supreme Court Decisions*

Decisions by the United States Suprem Court rendered contemporaneously with th ratification of the fourteenth amendme indicate that the Court did not perceive th fourteenth amendment to incorporate th federal Bill of Rights against the states. I *Twitchell v. Pennsylvania,* 74 U.S. (7 Wal 321, 19 L.Ed. 223 (U.S.1869), the Supre Court held that the fifth and sixth amen ments of the Constitution do not apply the states. This holding was consist with the earlier, well-known holding in *B ron v. Baltimore,* 32 U.S. (7 Peters) 24 L.Ed. 672 (1833).

In *Barron v. Baltimore* the questi presented to the court was whether the C of Baltimore was required to compens Barron under the fifth amendment for t taking of his property for public purpo When the City of Baltimore paved som streets, streams of water had been divert in the vicinity of Barron's wharf. The water had deposited large amounts of sand around the wharf. The sand deposits made these waters too shallow for ocean-going ships to load and unload cargo at the wharf. Chief Justice John Marshal held that Barron's claim raised no appropriate federal question because the fifth amendment was a constitutional limitation applied only against the federal government.[34]

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[33] It is always difficult to wade through the mass of historical research which has been done on both sides of the issue. For instance, while the defendant-intervenors introduced Professor Robert L. Cord's book, *Separation of Church and State: Historical Fact and Current Fiction* in support of the historical record upon which they are relying, Professor Cord concludes, in part, that a) the fourteenth amendment did incorporate the establishment clause against the states, *id.* at 101, and b) the Lord's Prayer, being distinctly Christian in character, or any other prayer which is readily identified with one religion rather than another is impermissible under the establishment clause, *id.* at 162–65.

The Court rejects the conclusion of Professor Cord that the fourteenth amendment incorporated the establishment clause against th states. Professor Cord uncritically adopted the analysis of the United States Supreme Court in reaching his conclusion. In only a footno does Professor Cord refer to the scholarship o Professor Charles Fairman; then only "do Professor Cord note that there has been som "controversy" surrounding the incorporatio issue.

Assuming arguendo that the establishm clause had been incorporated against the stat then Professor Cord would be correct in his conclusion that any activity which is religiously identifiable would be barred. *See infra* note 41 for the Court's discussion regarding secular humanism.

Another decision of the United States Supreme Court, decided in 1870, recognized that the federal Bill of Rights did not control the states.[35] After much deliberation over the question whether jury findings made in state court were reviewable in federal court, the Supreme Court noted that it was "admitted" that the limitations of the seventh amendment[36] did not apply to the states.

F. *Blaine Amendment*

The discussion up to this point has focused upon the incorporation of the federal Bill of Rights generally through the fourteenth amendment. Events which postdated the adoption of the fourteenth amendment show that the lawmakers of the Thirty-ninth Congress did not intend that the establishment clause would become binding upon the states with the ratification of the fourteenth amendment. " '[A] conclusive argument against the incorporation theory, at least as respects the religious provisions of the First Amendment, is the "Blaine Amendment" proposed in 1875.' " McClellan, *Christianity and the Common Law*, in Joseph Story and the American Constitution 118, 154 (1971) (quoting O'Brien, *Justice Reed and the First Amendment*, 116 (n.d.)). At the behest of President Grant, James Blaine of Maine introduced a resolution in the Senate in 1885 which read: "No *State* shall make any law respecting an establishment of religion or prohibiting the free exercise thereof." *Id.* at 154. (emphasis in original). Importantly, the Congress which considered the Blaine Amendment included twenty-three members of the Thirty-ninth Congress, the Congress which passed the fourteenth amendment.

> Not one of the several Representatives and Senators who spoke on the proposal even suggested that its provisions were implicit in the amendment ratified just seven years earlier. Congressman Banks, a member of the Thirty-ninth Congress, observed: "If the Constitution is amended so as to secure the object embraced in the principle part of this proposed amendment, it prohibits the States from exercising a power they now exercise." Senator Frelinghuysen of New Jersey urged the passage of the "House article," which "prohibits the States for the first time, from the establishment of religion, from prohibiting its free exercise." Senator Stevenson, in opposing the proposed

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[34] In *Barron v. City of Baltimore*, the Court noted:

> But it is universally understood, it is a part of the history of the day, that the great revolution which established the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments.
>
> In compliance with a sentiment thus generally expressed, the quiet fears were thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the States. *These amendments contained no expression indicating an intention to apply them to the state governments.* This court cannot so apply them.

Barron v. City of Baltimore, 32 U.S. (7 Pet.) 243, 250, 8 L.Ed. 672 (1883) (emphasis added).

[35] *Justices of the Supreme Court of New York v. United States*, 65 U.S. (9 Wall.) 274, 19 L.Ed. 658 (1870).

[36] In part the seventh amendment provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

> amendment, referred to *Thomas Jefferson: "Friend as he* [Jefferson] *was of religious freedom, he would never have consented that the States . . . should be degraded and that the Government of the United States, a government of limited authority, a mere agent of the States with prescribed powers, should undertake to take possession of their schools and of their* religion." Remarks of Randolph, Christiancy, Kernan, Whyte, Bogy, Easton, and Morton give confirmation to the belief that none of the legislators in 1875 thought the Fourteenth Amendment incorporated the religious provisions of the First.

Id. (quoting O'Brien, *Justice Reed and the First Amendment* 116–17 (emphasis added)).

The Blaine Amendment, which failed in passage, is stark testimony to the fact that the adoptors of the fourteenth amendment never intended to incorporate the establishment clause of the first amendment against the states, a fact which Black ignored. This was understood by nearly all involved with the Thirty-ninth Congress to be the effect of the fourteenth amendment.

G. *Proper Interpretative Perspective*

[10, 11] The interpretation of the Constitution can be approached from two vantages. First, the Court can attempt to ascertain the intent of the adoptors, and after ascertaining that attempt apply the Constitution as the adoptors intended it to be applied. Second, the Court can treat the Constitution as a living document, chameleon-like in its complexion, which changes to suit the needs of the times and the whims of the interpreters. In the opinion of this Court, the only proper approach is to interpret the Constitution as its drafters and adoptors intended. The Constitution is, after all, the supreme law of the land. It contains provisions for amending it; if the country as a whole decided that the present text of the Constitution no longer satisfied contemporary needs then the only constitutional course is to amend the Constitution by following its formal, mandated procedures. Amendment through judicial fiat is both unconstitutional and illegal. Amendment through judicial fiat breeds disrespect for the law, and it undermines the very basic notion that this country is governed by laws and not by men. *See generally* Breast, *The Misconceived Quest for the Original Understanding,* 60 B.U.L.Rev. 204 (1980) (discussing various approaches to constitutional interpretation).

Let us have faith in the rightness of our charter and the patience to persevere in adhering to its principles. If we do so then all will have input into change and not just a few.

H. *Stare Decisis*

[12] What is a court to do when faced with a direct challenge to settled precedent?[37] In most types of cases "it is more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406, 52 S.Ct. 443, 447, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting). This general rule holds even where the court is persuaded that it has made a serious error of interpretation in cases involving a statute.[38] How-

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[37] Abraham Lincoln once said, "'Stand with anybody that stands *right.* Stand with him while he is right and *part* with him when he does wrong.'" Jaffa, *In Defense of Political Philosophy,* 34 National Review 36 (1982) (emphasis in original).

[38] While stare decisis has more force in cases which determine the meaning of statutes as opposed to interpreting the Constitution, the Supreme Court has frequently reversed itself where it thinks an earlier decision involving the construction of a statute is in error. In *Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), the Supreme Court identified four factors which it considers when faced with the question whether to overrule a prior decision which involves a statute. The factors are: 1) whether the decisions in question misconstrued the meaning of the statute as revealed in its legislative history; 2) whether overruling the decisions would be inconsistent with more recent expressions of congressional intent; 3) whether the decisions in question constituted a departure from prior decisions; and 4) whether overruling these decisions would frustrate legislative reliance on

ever, in cases involving the federal constitution, where correction through legislative action is practically impossible, a court should be willing to examine earlier precedent and to overrule it if the court is persuaded that the earlier precedent was wrongly decided. *Id.* at 407, 52 S.Ct. at 447. "A judge looking at a constitutional decision may have compulsions to reverse past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it." Douglas, *Stare Decisis,* 49 Colum.L.Rev. 735, 736 (1949).

Certainty in the law is important. Yet, a rigid adherence to stare decisis "would leave the resolution of every issue in constitutional law permanently at the mercy of the first Court to face the issue, without regard to the possibility that the relevant case was poorly prepared or that the judgment of the Court was simply ill-considered. The danger is particularly great where the court has moved too far in an activist direction; in such a situation, legislative correction of the error is liable to be virtually impossible." Maltz, *Commentary: Some Thoughts on the Death of Stare Decisis in Constitutional Law,* 1980 Wis.L.Rev. 476, 492 (1980).

> [T]he "wall of separation between Church and State" that Mr. Jefferson built at the University [of Virginia] which he founded did not exclude religious education from the school. The difference between the generality of his statements on the separation of Church and State and the specificity of his conclusions on education are considerable. A rule of law should not be drawn from a figure of speech.

McCollum v. Board of Education, 333 U.S. 203, 247, 68 S.Ct. 461, 482, 92 L.Ed. 649 (1948) (per Reed, J., dissenting).

"[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." *Graves v. O'Keefe,* 306 U.S. 466, 491–92, 59 S.Ct. 595, 603–04, 83 L.Ed. 927 (1939) (Frankfurter, J., concurring). "By placing a premium on 'recent cases' rather than the language of the Constitution, the Court makes it dangerously simple for future Courts using the technique of interpretation to operate as a 'continuing Constitutional Convention.'" *Coleman v. Alabama,* 399 U.S. 1, 22–23, 90 S.Ct. 1999, 2010–11, 26 L.Ed.2d 387 (1970) (Burger, C.J.). "Too much discussion of constitutional law is centered on the Court's decisions, with not enough regard for the text and history of the Constitution itself." R. Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 296 (1977).[39]

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their holdings. *Id.* at 695–701, 98 S.Ct. at 2038–2041.

[39] Mr. Justice Stevens recently addressed the problem whether a court should follow authority which it believes to have been incorrectly decided. In a case which involved the construction of a statute, parents of Negro school children sued under the Civil Rights Act of 1866 (now 42 U.S.C. § 1982) for alleged discriminatory admission to private schools, which discrimination was based solely upon race. *Runyon v. McCrary,* 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976). The statute upon which the suit was based, 42 U.S.C. § 1981, was passed prior to the adoption of the fourteenth amendment. It provides in part that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State ... to make and enforce contracts ... as enjoyed by white citizens ...." In *Runyon* two children were denied admission to private schools in Virginia solely because they were Negro. The Supreme Court held that section 1981 prohibits private, commercially-operated, nonsectarian schools from denying admission to prospective students solely because of race. Mr. Justice Stevens concurred in the opinion of the Court, but his thoughts on stare decisis are noteworthy.

Mr. Justice Stevens felt compelled to join the opinion of the Court based upon a prior decision of the Court, *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968). However, the language of the Civil Rights Act of 1866 and its historical setting left "no doubt in [Mr. Justice Stevens'] mind that the construction of [42 U.S.C. § 1982] would have amazed the legislators who voted for it." *Runyon v. McCrary,* 427 U.S. at 189, 96 S.Ct. at 2603. Given a clean slate Mr. Justice Stevens would have allowed private, commercially-operated, nonsectarian schools the right to deny admission to prospective students solely because of race. He would have reached this result not because he thought that it was socially preferable to the result reached by the

This Court's review of the relevant legislative history surrounding the adoption of both the first amendment and of the fourteenth amendment, together with the plain language of those amendments, leaves no doubt that those amendments were not intended to forbid religious prayers in the schools which the states and their political subdivisions mandate.

I. *Summary*

"Th[e] mountain of evidence has become so high, one may have lost sight of the few stones and pebbles that made up the theory that the Fourteenth Amendment incorporated Amendments I to VIII." Fairman, *supra* note 25, at 134. Suffice it to say that the few stones and pebbles provide precious little historical support for the view that the states were prohibited by the establishment clause of the first amendment from establishing a religion.[40]

More than any other provision of the Constitution, the interpretation by the United States Supreme Court of the establishment clause has been steeped in history. This Court's independent review of the relevant historical documents and its reading of the scholarly analysis convinces it that the United States Supreme Court has erred in its reading of history. Perhaps this opinion will be no more than a voice crying in the wilderness and this attempt to right that which this Court is persuaded is a misreading of history will come to nothing more than blowing in the hurricane, but be that as it may, this Court is persuaded as was Hamilton that "[e]very breach of the fundamental laws, though dictated by necessity impairs the sacred reverence which ought to be maintained in the breast of the rulers towards the constitution." R. Berger, *supra* note 26, at 299 (quoting Federalist No. 25 at 158).

[13] Because the establishment clause of the first amendment to the United States Constitution does not prohibit the state from establishing a religion, the prayers offered by the teachers in this case are not unconstitutional. Therefore, the Court holds that the complaint fails to state a claim for which relief could be granted.

J. *Conclusion*

There are pebbles on the beach of history from which scholars and judges might attempt to support the conclusions that they are wont to reach. That is what Professors Flack, Crosskey and the more modern scholars have done in attempting to establish a beachhead, as did Justice Black, that there is a basis for their conclusions that Congress and the people intended to alter the direction of the country by incorporating the first eight amendments to the Constitution. However, in arriving at this conclusion, they, and each of them, have had to revise established principles of constitutional interpretation by the judiciary. Whether the judiciary, inadvertently or eagerly, walked into this trap is not for discussion. The result is that the judiciary has, in fact, amended the Constitution to the consternation of the republic. As Washington pointed out in his Farewell Address, *see* p. 4 *supra*, this clearly is the avenue by which our government, can and ultimately, will be destroyed. We think we move in the right direction today, but in so doing we are denying to the people their right to express themselves. It is not what we, the judiciary want, it is what the people want translated into law pursuant to the plan established in the Constitution as the framers intended. This is the bedrock and genius of our republic. The mantle of office gives us

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Supreme Court, but simply because the intent of Congress and the legislative history surrounding the adoption of 42 U.S.C. § 1981 mandated such a result.

Where Mr. Justice Stevens was unwilling to dissent from his brethren in a case involving statutory construction, this Court feels a stronger tug from the Constitution which it has sworn to support and to defend.

[40] Professor Fairman has summarized concisely in several pages all of the stones and pebbles which could conceivably be relied upon to support the conclusion that the fourteenth amendment intended to incorporate the federal Bill of Rights against the states. See Fairman, *supra* note 25, 134–35.

no power to fix the moral direction that this nation will take. When we undertake such course we trample upon the law. In such instances the people have a right to complain. The Court loses its respect and our institution is brought low. This misdirection should be cured now before it is too late. We must give no future generation an excuse to use this same tactic to further their ends which they think proper under the then political climate as for instance did Adolph Hitler when he used the court system to further his goals.

What is past is prologue. The framers of our Constitution, fresh with recent history's teachings, knew full well the propriety of their decision to leave to the peoples of the several states the determination of matters religious. The wisdom of this decision becomes increasingly apparent as the courts wind their way through the maze they have created for themselves by amending the Constitution by judicial fiat to make the first amendment applicable to the states. Consistency no longer exists. Where you cannot recite the Lord's Prayer, you may sing his praises in God Bless America. Where you cannot post the Ten Commandments on the wall for those to read if they do choose, you can require the Pledge of Allegience. Where you cannot acknowledge the authority of the Almighty in the Regent's prayer, you can acknowledge the existence of the Almighty in singing the verses of America and Battle Hymn of the Republic. It is no wonder that the people perceive that justice is myoptic, obtuse, and janus-like.

If the appellate courts disagree with this Court in its examination of history and conclusion of constitutional interpretation thereof, then this Court will look again at the record in this case and reach conclusions which it is not now forced to reach.[41]

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[41] One of the first of these considerations is whether the teachers and those students who desire to express the simple prayers have any rights to freedom of speech. Compare what the Court observed in the order which granted the preliminary injunction in the companion case, 82-0792-H, against the state on the first amendment right of students to pray at school. 544 F.Supp. 727 at 732-33. The evidence in the case demonstrates that the school board took no active part in any decision made by the teachers to utilize the simple prayer that they have. The school board nor any of the official body of the school administration encouraged or discouraged these teachers from exercising their own will in the matter. Nor does the evidence indicate that those students who opted for this type of exercise were coerced into participating or not participating.

In dealing with matters religious the exercise of first amendment rights are highly circumscribed. The same does not appear to be true in dealing with first amendment rights in expressing one's opinions in all other matters whether they be expressions of moral concern or immoral concern.

The second major area that this Court must concern itself with should this judgment be reversed is that raised by the evidence produced by the intervenors dealing with other religious teachings now conducted in the public schools to which no attention has apparently been directed and to which objection has been lodged by the intervenors.

There are many religious efforts abounding in this country. Those who came to these shores to establish this present nation were principally governed by the Christian ethic. Other religions followed as the population grew and the ethnic backgrounds were diffused. By and large, however, the Christian ethic is the predominant ethic in this nation today unless it has been supplanted by secular humanism. Delos McKown, witness for the plaintiff, expressed himself as believing that secular humanism has been more predominant through the years than we have imagined and indeed was more akin to the beliefs of George Washington, Thomas Jefferson, Benjamin Franklin, and others of that era. Delos McKown also testified that secular humanism is not a religion, though he ultimately waffled on this point. The reason that this can be important to the decision of this Court is that case law deals generally with removing the teachings of the Christian ethic from the scholastic effort but totally ignores the teaching of the secular humanist ethic. It was pointed out in the testimony that the curriculum in the public schools of Mobile County is rife with efforts at teaching or encouraging secular humanism—all without opposition from any other ethic—to such an extent that it becomes a brainwashing effort. If this Court is compelled to purge "God is great, God is good, we thank Him for our daily food" from the classroom, then this Court must also purge from the classroom those things that serve to teach that salvation is through one's self rather than through a diety. Indeed, the Supreme Court in *Abington School District v. Schempp*, 374 U.S. 203, 225, 83 S.Ct. 1560, 1573, 10 L.Ed.2d 844 (1963) (quoting *Zorach v. Clauson*, 343 U.S. 306, 314, 72 S.Ct. 679, 684,

III. *Order*

It is therefore ordered that the complaint in this case be dismissed with prejudice. Costs are taxed against the plaintiffs. Fed. R.Civ.P. 54(d).

Ishmael JAFFREE, et al., Plaintiffs,

v.

Fob JAMES, in his official capacities as Governor of the State of Alabama and ex officio member of the State Board of Education; Charles Graddick, in his official capacity as Attorney General for the State of Alabama; John Tyson, Jr., Ron Creel, S.A. Cherry, Ralph Higginbotham, Victor P. Poole, Harold C. Martin, James B. Allen, Jr., and Roscoe Roberts, Jr., in their official capacities as members of the Alabama State Board of Education, Defendants.

Civ. A. No. 82–0792–H.

United States District Court,
S.D. Alabama, S.D.

Jan. 14, 1983.

Action was brought to challenge the Alabama "Prayer Law" as being in viola-

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96 L.Ed. 954) (1952), noted that "the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to a religion, thus preferring those who believe in no religion over those who do believe."

That secular humanism is a religion within the definition of that term which the "high wall" must exclude is supported by the finding in *Torcaso v. Watkins,* 367 U.S. 488, 495 n. 11, 81 S.Ct. 1680, 1684 n. 11, 6 L.Ed.2d 982 (1961), which recognized that secular humanism is a religion in the traditional sense of the word and also in the statement of the 276 intellectuals who advocate the doctrine of secular religion as delineated in the *Humanist Manifesto I and II.* (Defendant-intervenors exhibit # 10).

Textbooks which were admitted into evidence demonstrated many examples in the way this theory of religion is advanced. The intervenors maintain that their children are being so taught and that this Court must preclude the Mobile County School Board from continuing to advance such a religion or in the alternative to allow instruction in the schools that would give a child an opportunity to compare the ethics of each religion so as to make their own credibility or value choices. To this extent, this Court is impressed that the advocacy of the intervenors on the point of necessity makes them parties plaintiff and to this extent they should be realigned as such inasmuch as both object to the teaching of certain religions.

This Court is confronted with these two additional problems that must be resolved if the appellate courts adhere to their present course of interpreting history as did Mr. Justice Black. Should this happen then this Court will hunker down to the task required by the appellate decisions. A blind adherence to Justice Black's absolutism will result in an engulfing flood of other cases addressed to the same point raised by intervenors. The Court will be called upon to determine whether each book or any statement therein advances secular humanism in a religious sense, a never-ending task. Already the involvement of this Court with determining state activities in such things as prison cases, occupies one-third of its docket. This Court can anticipate no less of a burgeoning docket brought about by this incursion into what is legitimately a state concern.

The founding fathers were far wiser than we. They were content to allow the peoples of the various states to handle these matters as they saw fit and were patient in permitting the processes of change to develop orderly by established procedure. They were not impatient to bring about a change because we think today that it is the proper course or to set about to justify by misinterpretation the original intent of the framers of the Constitution. We must remember that "He, who reigns within Himself, and rules passions, desires, and fears, is more a king" Milton, *Paradise Regained.* If we, who today rule, do not follow the teachings of history then surely the very weight of what we are about will bring down the house upon our head, and the public having rightly lost respect in the integrity of the institution, will ultimately bring about its change or even its demise.

THE FREE CONGRESS RESEARCH AND EDUCATION FOUNDATION

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THE MAKING AND THE UNMAKING OF THE ESTABLISHMENT CLAUSE

James McClellan

The disestablishment of the Anglican Church in Virginia, which Thomas Jefferson accomplished in 1786 with the help of James Madison, is commonly thought to have prepared the way for the adoption of the First Amendment to the Constitution of 1791, declaring that "Congress shall make no law respecting the Establishment of a Religion."[1] As Justice Joseph Story later observed in his famed *Commentaries on the Constitution*, "the real object of the [First] Amendment was not to countenance, much less to advance Mohametanism, or Judaism, or infidelity, by prostrating Christianity, but to exclude all rivalry among *Christian* sects, and to prevent any *national* ecclesiastical establishment which would give to an hierarchy the exclusive patronage of the *national* government."[2] Directed solely against Congress, the establishment clause gave the states, by implication, full authority to determine church-state relations within their respective jurisdictions. Thus the establishment clause actually had a dual purpose: to guarantee to each *individual* that Congress would not impose a national religion, and to each *state* that it was free to define the meaning of religious establishment under its own state constitution and laws. The federal government, in other words, simply had no authority over the states respecting the matter of church-state relations. To be sure, one of the principal reasons for the adoption of the entire Bill of Rights, as we shall see, was to deny the federal government a commanding voice in the general area of civil liberties, except as stipulated in the Constitution itself.[3] The power to define civil liberties within the several states, including the power to decide what practices were acceptable under the general heading of church-state relations, was, in the true sense of that much abused term, the state's right, as determined by state constitutions and state bills of rights.

Such is where matters stood until 1947, when the Supreme Court endeavored for the first time to expound upon the meaning of the establishment clause in the landmark case of *Everson v. Board of Education* (1947).[4] Pursuant to a state law, the township of Ewing, New Jersey authorized the reimbursement to parents of money expended for the transportation of their children to and from public and parochial schools. A taxpayer challenged the validity of the law on the grounds that it violated the due process clause of the Fourteenth Amendment, and also constituted an unconstitutional "establishment of religion." Speaking for a sharply divided Court, Mr. Justice Black announced that: "The First Amendment, as made applicable to the states by the fourteenth. . .commands that a *state* 'shall make no law respecting an establishment of religion.' "[5] This was the first instance in which the Court interpreted the establishment clause as a restriction on the states. It was a bold and revolutionary step, overturning more than a century and a half of established precedent that had uniformly permitted the States to set public policy regarding their relations with religious organizations. No less novel was the Court's newfangled theory of the establishment clause and its formal adoption of Thomas Jefferson's "Wall of Separation" doctrine. The First Amendment, said Black, "erected a wall of separation between church and state," prohibiting the federal and state governments from giving aid of any kind not only to particular religious sects, but to all religions in general. "Neither a state nor the federal government," contended Justice Black, "can set up a church. Neither can pass laws which aid one religion, *aid all religions*, or prefer one religion over another. . . . *No* tax in *any* amount, large or small, can be levied to support *any* religious activities or institutions. . . ."[6]

This absolutist pronouncement by Justice Black, it must be emphasized, has become the foundation stone for the modern Court's interpretation of the establishment clause. Whether the issue has been Bible-reading, prayer in the public schools, or tuition grants for parochial school children, Black's oft-quoted dictum is sure to be found at the heart of the Court's opinion. But in *Everson* the Court softened the impact of its new view of the establishment clause by upholding the law in question as a welfare measure assisting children rather than religion. Thus the real significance of *Everson* lies not in the Court's ruling, but in its adoption of an absolutist theory of church-state relations. Both the majority and dissenting members of the Court were unanimously agreed that the establishment clause should be interpreted as an absolute restriction on governmental aid to religion. "In the words of Jefferson," concluded the Court, "the clause against the establishment of religion by law was intended to erect 'a wall of separation between church and state.' "[7]

The judicial history of the establishment clause since 1947 has been little more than a replay of *Everson*, each justice endeavoring to apply Black's dictum to the factual situation under review, while at the same time attempting to refine it as a workable test for determining the limits of state involvement in the religious affairs of the community. In *McCollom v. Champaign Board of Education* (1948),[8] the Court invalidated a "released time" program in an Illinois school district which allowed children to receive religious instruction in the public schools. The program provided that pupils whose parents had signed a "request card" were excused from their classrooms to attend religious lectures given without pay by Protestant, Catholic, and Jewish teachers, but within the school building and during the regular class day. Pupils not participating in the program were required to continue their secular studies in other classrooms. Speaking again through Mr. Justice Black, a divided Court held that this program of religious education violated the establishment clause, as applied to the states by the due process clause of the Fourteenth Amendment. Following the dictum laid down in *Everson* that the First Amendment erected an absolute wall of separation between church and state, the Court ruled that the program was unconstitutional because it utilized a "tax-established and tax-supported school system to aid religious groups to spread their faith."[9]

The case of *Engel v. Vitale*,[10] decided in 1962, involved a local school district in New York which under state law had directed the principal of a public school to cause a prayer to be said aloud by each class at the commencement of the school day. Students who did not wish to participate were permitted to remain silent or to leave the classroom. Seemingly innocuous on its face, the non-denominational prayer, composed and recommended by the State Board of Regents, read simply: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country." In a brief opinion, again written by Black, the Court invalidated the authorizing statute as a violation of the First and Fourteenth Amendments. Clearly, argued the Court, the recitation of a prayer was a religious activity. There was no doubt in Justice Black's mind that "in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government."[11]

Citing these decisions and a mixed variety of other legal and historical precedents, the Court arrived at a conclusion similar to that reached in the Prayer decision when it decided in 1963 that Pennsylvania and Maryland had breached the "wall of separation" between church and state by requiring public schools to begin each day with readings from the Bible. Despite the fact various Protestant, Catholic and Jewish versions of the Holy Scriptures were used, without prefatory statements, questions, or explanations, and non-participants were allowed to absent themselves from the classroom, Mr. Justice Clark found for the Court that the practice of governmental sponsored Bible-reading was not permissible under the Constitution. As applied to the states, the First Amendment, Clark declared, requires "that the Government maintain strict neutrality, neither aiding nor opposing religion."[12]

Board of Education v. Allen (1968), the last case of major importance on church-state relations in the Warren Court, represented a return to the "child benefit" theory of *Everson*. In sustaining a state statute authorizing the loaning of secular textbooks to all public and parochial students under New York's education law, the Court, speaking this time through Justice White, reasoned that "[t]he law merely makes available to all children the benefits of a general program to lend schoolbooks free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the state. Thus, no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools."[13] Citing *Everson* and *Schempp*, White announced that the test of constitutionality was whether the statute in question had "a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[14] He acknowledged that "[t]his test is not easy to apply,"[15] but concluded that under these standards the statute in question was no different from that which the Court found acceptable in *Everson*.

Since 1969, when Warren Burger succeeded Earl Warren as Chief Justice, the Court has endeavored to follow the difficult course laid out in *Everson*, steering between the Scylla of Black's absolutist theory and the Charibdis of his actual holding in *Everson*. From the standpoint of uniformity, the decisions have not been entirely satisfactory, and the Court seems to have made little progress in resolving what Chief Justice Burger has accurately described as the "internal inconsistency in the opinions of the Court . . ."[16] Certainly it is difficult to disagree with Justice Powell's contention that the Court's decisions, viewed as a whole, lack a coherent rationale. The cases, for example, reflect the questionable assumption that government aid to church-related colleges is less obtrusive than government aid to primary and secondary schools, where the students are supposedly more susceptible to religious indoctrination.[17] It is not entirely clear why government funding of bus transportation to and from parochial schools is acceptable under the establishment clause, but public funding of transportation for field trips is not;[18] nor is there a sharp analytical distinction between state aid in the form of textbooks, which is not prohibited, and state aid in the form of other instructional materials, such as maps, which is prohibited.[19] In terms of aid to religion, it would also seem that a tax exemption to a house of worship has a more direct effect than a tax credit to the parent of a child enrolled in a church-affiliated school.[20] These distinctions without a difference, suggests Powell, may be justified on the grounds that the Court has wisely sacrificed logical consistency in order "to establish principles that preserve the cherished safeguard of the Establishment Clause" while at the same time encouraging "the positive contributions of sectarian schools. . . ."[21]

The balancing of these diverse interests is surely a delicate task that has produced much disagreement and doctrinal confusion in the Court. In reality, the Court seems to have worked itself into a corner, straining on the one hand to maintain Black's absolutism, while on the other to accommodate deeply rooted habits and practices that actually breach the wall of separation. Comparing the decisions of the present Court with those of the Vinson-Warren era, it is nevertheless reasonable to say that "[b]oth the absolutism of Mr. Justice Black and his particular conceptions of religion's relation to government seem, on the whole, to wane in influence as the Burger Court takes shape."[22] Although this modest departure has not been applauded by all the members of the Court, there is no denying that "the heritage of Mr. Justice Black appears presently to receive a somewhat skeptical attention. The present Court expressly abjures 'absolutism'; it 'balances' or 'accommodates' the First Amendment provisions which Mr. Justice Black regarded as unqualified."[23] Whether this trend will continue, and the ultimate fate of Justice Black's absolutism, are questions that cannot now be answered. But this much seems obvious: The number of ways in which public funds can be channeled into the private sector for the benefit of nonpublic education is not infinite. There are some schemes which have yet to be examined by the Court, such as the experimental voucher system, but on the whole it may be that we have already reached the limits of possible funding alternatives. If this is so, then we can expect fewer decisions under the establishment clause and a greater likelihood that the theory of church-state relations adopted by the Court, despite its internal contradictions, will become a more permanent fixture of the American constitutional system.

To a generation of Americans raised under the common assumption that it is only natural and fitting that the Supreme Court should determine state policies and practices respecting church-state relations, these cases handed down over the past thirty-four years are seldom viewed as unconstitutional usurpations of state authority. When examined in the light of the historical setting of the Bill of Rights and state religious practices before 1947, however, the *Everson* line of cases can be seen as one of the most radical innovations in American constitutional law since 1787. This article maintains that *Everson* and the entire body of case law built upon it, including the Prayer and Bible-reading decisions, represent an unhistorical view of church-state relations in the early Republic, and are actually contrary to the expressed intent of the Framers and the very purpose of the establishment clause at the time of its adoption. Moreover, it is contended here that the Fourteenth Amendment, which serves as the constitutional vehicle for the application of the establishment clause to the states, was not intended by those who participated in its framing and adoption to alter the scope or original meaning of the establishment clause.

CHURCH-STATE RELATIONS IN THE EARLY REPUBLIC

Although all of the American colonies in the revolutionary period were eager to loosen the existing bonds of religious establishment, each pursued an independent course in reaching this objective. At the outbreak of the Revolution, there were varying forms of established churches in nine of the colonies. In the Southern colonies of Maryland, Virginia, North Carolina, South Carolina and Georgia, the established religion was Anglicanism. In New England, Congregationalism was, in effect, the established church in three colonies—Massachusetts, New Hampshire, and Connecticut. New York had a unique arrangement allowing for the establishment of the Protestant religion.[24] But in all of these nine colonies, the established churches were linked politically with the colonial governments rather than the mother country, so that when the colonies became independent states the connection between church and state remained in force. Hence the Revolution itself did not alter the system of church-state relations; what it did was to set in motion the forces of disestablishment that ultimately prevailed throughout most of the American colonies.[25]

Religious Disestablishment in New England. Led by Isaac Backus, the Baptists agitated for disestablishment in New England throughout the revolutionary period. But their memorials and petitions failed to dislodge the Congregationalists, who enjoyed widespread support among a majority of the population, and church-state relations in New England remained essentially the same.

Rhode Island and Connecticut became states in the new confederation under their old charters, and no changes were made regarding the civic relations of the church. Rhode Island remained committed by its charter of 1663 to the principle of separation of church and state, guaranteeing its subjects "the free exercise and enjoyment of all their civil and religious rights." As long as they did not "disturb the civil peace" or abuse their religious liberty to promote "lycentiousnesse and profanenesse," citizens of the state were free to state their "differences of opinion in matters of religion." Such a broad scope of religious liberty was actually an aid to the Christian religion, implied the framers of the charter, because it placed the citizens "in the better capacity to defend themselves, in theire just rights and libertyes against all the enemies of the Christian faith."[26]

In Connecticut, the establishment of the Congregational Church was retained, but other Protestant sects were allowed to practice their faith. In 1778, Congregationalists who had separated from the mother church were exempted from taxes for its support; and in 1784 an act was passed stating that no person professing the *Christian* religion would be required to pay taxes for the established church, or penalized for not attending worship there, providing he continued to attend and helped to maintain worship at his own church. Those who did not belong to any religious society were to be taxed for the support of the established church, and *Protestant* dissenters were allowed by law to maintain their own societies. Entitled an "Act for Securing The Rights of Conscience," this statute specified that citizens of Connecticut were expected "on the Lord's day carefully to apply themselves to the duties of religion and piety." Persons failing to "attend the public worship of God on the Lord's day in some congregation allowed by law" were to be fined three shillings "unless hindered by sickness or otherwise prevented" from attending church.[27]

The state constitution of New Hampshire, adopted in 1776, contained no provisions concerning religious matters; but in

1784, a new constitution, prefaced by a bill of rights, was adopted where it was declared that every citizen "has a natural and unalienable right to worship God according to the dictates of his own conscience." Under the provisions of this constitution, however, the old colonial law which in effect gave to the Congregational churches the status of a town institution, remained in force. Each town was authorized to elect its own minister; and to promote "morality and piety," the state legislature was empowered to authorize "the several towns, parishes, bodies politic, or religious societies...to make adequate provision, at their own expense, for the support and maintenance of public *Protestant* teachers of piety, religion, and morality, with the understanding that "no person of any one particular religious sect" would be "compelled to pay towards the support of the teacher of another persuasion."[28] The constitution further stipulated that all members of the state legislature "shall be of the *Protestant* religion."[29]

The arrangement in Massachusetts, determined by the constitution of 1780, was strikingly similar to that of New Hampshire. Indeed, the Massachusetts constitution had served as a model for the architects of the New Hampshire constitution. Massachusetts retained its colonial practice of giving the Congregational church a civil status, allowing every taxpayer to indicate his preference as to which church should receive his support. Those who failed to state their choice were required to pay taxes for the support of the Congregational Church. According to the constitution, each town in the state was authorized "to make suitable provision," at its own expense, "for the institution of the public worship of God, and for the support and maintenance of public Protestant teachers of piety, religion and morality."[30] All public officials were required to take an oath that they "believe in the *Christian* religion and have a firm persuasion of its truth."[31]

Standing between the liberality of the Rhode Island charter and the more restrictive fundamental law of New Hampshire, Connecticut, and Massachusetts, the Vermont constitution of 1777 meekly urged "every sect or denomination...to observe the Sabbath," while declaring that "no man ought, or of a right can be compelled to attend any religious worship, or erect, or support any place of worship, or maintain any minister, contrary to the dictates of his own conscience." At the same time, the constitution specified that no man professing the *Protestant* religion should be deprived of his civil rights "on account of his religious sentiment, or peculiar mode of religious worship,"[32] In addition, every member of the state house of representatives was required to meet a religious test for office by swearing: "I do believe in one God, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked; and I do acknowledge the scriptures of the Old and New Testaments to be given by divine inspiration; and own and profess the Protestant religion."[33] All of these provisions were carried over into the revised constitution of 1786. Moreover, a law enacted by the state legislature in 1783 allowed for support of the Congregational Church in the townships through local taxation.[34]

Religious Disestablishment in the Middle-Atlantic States. Turning southward, a similar pattern of discrimination against Dissenters and non-Protestants is encountered. The New York constitution of 1777, supplemented by an act of 1784, abrogated all laws establishing or maintaining "any particular denomination of Christians or their ministers," and all laws "which do grant certain emoluments and privileges to the Episcopal Church." The constitution also declared that "the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed." Making an about-face, the constitution also demanded, however, that all persons naturalized by the state be required to take an oath abjuring their foreign allegiances and subjection in all matters, "ecclesiastical as well as civil."[35] (This provision, as Judge Story later pointed out, "was doubtless intended to exclude all Catholics, who acknowledged the spiritual supremacy of the Pope, from the benefits of naturalization.")[36]

In New Jersey, the constitution of 1776 guaranteed each person "the inestimable privilege of worshipping God according to the dictates of his own conscience," but at the same time imposed a religious test for office, limiting eligibility for the state legislature to "persons professing a belief in the faith of any *Protestant* sect."[37] Similarly, the Delaware constitution of 1776, while declaring that "[t]here shall be no establishment of any one religious sect in this state in preference to another," required all persons holding public office to declare by oath their faith in the doctrine of the Trinity and in the divine inspiration of the Old and New Testaments.[38]

Pennsylvania, which in the colonial period had limited inhabitancy to believers in God and had denied both the franchise and public office to Catholics and disbelievers in the doctrine of the Trinity, "entered the revolutionary period with a restrictive legislation unsurpassed by that of any other" state. In "so far as terms of law made definitions, there was less liberty in Pennsylvania than in theocratic Massachusetts and conforming Virginia."[39] These restrictions were removed in part by the constitution of 1776, which declared that "all men have a natural and inalienable right to worship God, according to the dictates of their own consciences." In addition, the constitution forbade government to support religion through public taxation and "to interfere with, or in any manner control, the right of conscience in the free exercise of religious worship." Nevertheless, civil rights were confined to persons "who acknowledge the being of a God,"[40] and officeholders were required to affirm by oath their belief in God and in the divine inspiration of the Old and New Testaments.[41]

Religious Disestablishment in the South. Nor was a total separation of church and state sought in the Southern colonies during the revolutionary period, except in Virginia. In Maryland, for example, the constitution adopted in 1776 authorized the state legislature to lay a general tax for the support of the *Christian* religion.[42] The North Carolina constitution of 1776 established a religious qualification for office, declaring that no person could hold a place of public trust if he denied "the truth of the *Protestant* religion, or the divine authority of either the Old or New Testament."[43] The South Carolina constitution of 1778 flatly stated that "The *Christian Protestant* religion shall be deemed...the established religion of the State." Accordingly, no religious society was entitled to incorporation as a church of the state unless its members agreed "that there is one Eternal God and a future state of reward and punishment; that God is publicly to be worshipped; that the *Christian* religion is the true religion; that the Holy Scriptures of the Old and New Testaments are of divine inspiration and...that it is lawful and the duty of every man...to bear witness to the truth." Moreover, pastors were required to declare that they would instruct their congregations in the lessons of Scripture.[44] Finally, in Georgia, the constitution adopted in 1777 disestablished the Anglican Church, but at the same time allowed for the public support of religion through taxation. "All persons whatever shall have the free exercise of their religion," it was asserted in Article LVI, and they "shall not, *unless by consent*, support any teacher or teachers except those of their own profession."[45] This meant that Georgians could be taxed for the support of their own religion. Accordingly, a law was passed in 1785 stipulating that all Christian sects would receive tax support in proportion to the amount of property owned by their members.[46] The constitution of 1777 further required that "all members of the legislature shall be of the *Protestant* religion."[47]

Among the Southern states, only in Virginia, it seems, was a complete separation of church and state accepted in principle. But only grudgingly did Virginians advance to this state of mind. At the convention of 1776, Episcopalians and Methodists petitioned unsuccessfully against disestablishment, and the Church of England was severed from the civil authority. A bill of rights was drafted by George Mason, but the section on religion suggested by Patrick Henry was worded in such a way as to imply that there would be no guarantee of complete religious freedom in the Old Dominion. Henry's proposal stated "that all men should enjoy the fullest toleration in the exercise of religion according to the dictates of conscience, unpunished and unrestrained by the magistrate, unless under color of religion any man disturb the peace, the happiness, or safety of society." James Madison insisted that the word *toleration* contained a "dangerous implication," as did the reference to a magistrate. "Toleration," he argued, "belonged to a system where [there] was an established church, and where a certain liberty of worship was granted, not of right, but of grace; while the interposition of the magistrate might annul the grant." The convention agreed, and the objectionable clause was rejected in favor of Madison's amendment, which read: "all men are equally entitled to the full and free exercise of religion, according to the dictates of conscience." Madison was also successful in gaining acceptance of a restraining clause, which declared that "[n]o man, or class of men, ought on account of religion to be invested with peculiar emoluments of privileges, nor subjected to any penalties or disabilities, unless under color of religion the preservation of equal liberty and the existence of the State are manifestly endangered." Thus committed to a broad and revolutionary concept of religious liberty, the Virginia bill of rights stood out conspicuously with the Rhode Island charter against the prevailing mood of quasi-establishment in other states.[48]

The task of implementing these principles now fell to the Virginia legislature. Although disestablished, the Church of England still enjoyed certain advantages over other religious sects. Only the Anglican clergy, for example, could marry without a special license. Meeting soon after the convention, the legislature proceeded under the leadership of Thomas Jefferson to remove the last pillars of religious establishment. All previous acts providing for ministers' salaries were repealed, Quaker and Mennonite ministers were empowered to perform marriages without a license, and in general the Episcopal Church was left to regulate its own affairs.[49]

But Patrick Henry and the supporters of religious establishment were not without power and influence, and in 1784 the legislature reversed its position, passing a bill to the second reading which stated that Virginia should promote the Christian religion and render financial aid to all religious sects. This was to be accomplished through a general assessment whereby each taxpayer would be allowed to select the church that should receive his tax. General Washington, Richard Henry Lee, John Marshall and Patrick Henry, joined by the Episcopal and Presbyterian clergy, supported the measure. They were opposed by Madison and Jefferson, who made a direct appeal to the people for support against the bill. Accordingly, a Memorial and Remonstrance, drafted by Madison, was circulated throughout the state for signature, declaring that under the Virginia Bill of Rights, no government could come to the aid of religion. So great was public opinion in favor of Madison's position that the legislature was compelled to abandon the bill.[50]

These accomplishments of Madison were further embellished by the actions of Jefferson, who, sensing weakness in the opposition, now came forward with a proposal advocating complete religious freedom for all religious sects and for all dissenters. Entitled, "An Act Establishing Religious Freedom," this measure was enacted into law in 1786. Henceforth, no Virginian could be "compelled to support any religious worship, place, or ministry whatever; nor shall be enforced, restrained, molested, or burthened in his body or goods," nor otherwise caused "to suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities."[51]

Thus, after prolonged debate, Virginia emerged from the revolutionary period embracing the broadest sort of religious liberty possible. But at this juncture in the movement toward religious disestablishment, the Virginia experience was almost wholly unprecedented in America. On the eve of the Philadelphia Convention of 1787, the wall of separation doctrine espoused by Madison and Jefferson had been rejected in every state but Virginia and Rhode Island. Strictly speaking, of course, there was not an established church in any of the fourteen states at this time, for even in those states where a specifically identifiable sect or group of sects enjoyed a favored status, other religious denominations were allowed to worship as they pleased.[52] In four states, Massachusetts, Connecticut, Vermont, and New Hampshire, the Congregationalist Church occupied a position of quasi-establishment as a result of direct or indirect benefits conferred by the state constitutions and statutes. Ten states extended preferential treatment to the Protestant religion, and two states, Delaware and Maryland, favored simply the Christian religion. Add to this fact that, "Four [states], Pennsylvania, Delaware, and the Carolinas, required assent to the divine inspiration of the Bible. Two, Pennsylvania and South Carolina, demanded a belief in heaven and hell. Three, New York, Maryland, and South Carolina, excluded ministers from civil office. Two, Pennsylvania and South Carolina, emphasized belief in one eternal God. One, Delaware, required assent to the doctrine of the Trinity. And five, New Hampshire, Massachusetts, Connecticut, Maryland, and South Carolina, adhered to a religious establishment. In one, South Carolina, the obnoxious term *toleration* found a constitutional place."[33]

From the foregoing it would appear that there were basically three patterns of church-state relations in late eighteenth century America: quasi-establishment of a specific Protestant sect, as seen in most of New England; quasi-establishment of the Protestant religion, as seen throughout most of the nation; and the disestablishment of all religious sects, as seen in Rhode Island and Virginia. Three states adopted the position that allowed one sect of *Protestants, viz.*, Congregationalists, to be preferred over other Protestant sects. Most of the states disclaimed all preference of one sect of *Protestants* over another. And two states, Virginia and Rhode Island, disclaimed all preference of *any* religious sect over another. Only two states, Delaware and Maryland (and possibly Georgia) disclaimed all preference of one sect of *Christians* over another. But all of the states still retained the Christian religion as the foundation stone of their social, civil and political institutions. Not even Rhode Island and Virginia renounced Christianity, and both states continued to respect and acknowledge the Christian religion in their system of laws.

Thus it may be seen that not only did nearly every state reject the Jeffersonian system of church-state relations, but most states also went beyond what is nowadays termed the "No Preference" theory of church-state relations, which holds that most states arranged matters in such a way that all religions would receive political support and none would be preferred over another. But in fact ten of the fourteen states at the time of the adoption of the Constitution simply refused to prefer one *Protestant* sect over another; that is, they placed Protestants in a preferred status over Catholics, Jews, and Dissenters. In the ensuing years, as we shall see, the standard to which most states advanced was more like that of Delaware and Maryland than that of Virginia. Thus it can be seen that in the formative period of the American political tradition of church-state relations, there is little room for the Rhode Island-Virginia model or for the historical interpretation introduced by the Supreme Court in 1947. Developments in the early nineteenth century, to which we now turn, show that most states continued to reject the concept of total separation after the adoption of the First Amendment.

DISESTABLISHMENT IN THE EARLY NINETEENTH CENTURY

It is important to keep in mind that the adoption of the Federal Constitution in 1789 and the Bill of Rights in 1791 had no legal effect whatsoever on church-state relations in the separate states. Article VI of the Constitution stipulated that "no religious test shall ever be required as Qualification to any Office or public trust under the United States;" and the First Amendment forbade Congress to pass any law "respecting an establishment of religion, or prohibiting the free exercise thereof." But as students of the Constitution have so frequently observed, "neither of these prohibitions was laid upon the individual states.... Broad as were the principles upon which the national government was based, the matter of church establishment or disestablishment, of taxation compulsory or by voluntary contribution, of test acts, oaths and religious qualifications for office, was left entirely to the discretion of the sovereign states."[54] The significance of this fact in relation to the Supreme Court's involvement in the issue will be explored later; for the moment it is enough to say that "The real battle of religious liberty [and disestablishment] was fought out in the State legislatures and conventions."[55]

In New England, where the principal issue was financial support of religion, the established churches managed to retain their status in some states for more than a quarter of a century after the adoption of the First Amendment. Connecticut is a case in point. Here, the pillars of religious establishment were actually strengthened in 1791 by a law requiring dissenters to file certificates demonstrating proof of membership in a dissenting church in order to avoid the state tithe.[56] Not until 1818, when a new constitution was narrowly adopted, did religious establishment cease to exist in Connecticut. Article I proclaimed the free exercise of religion and ordained that "no preference shall be given by law to any Christian sect."[57] It was further stipulated in Article VII that "no person shall by law be compelled to join or support, nor be classed with, or associated to, any congregation, church, or religious association."[58] Vermont, eleven years earlier, had already abandoned the practice of tithes and town-support of churches.[59]

But New Hampshire stood against the tide of disestablishment. Although a new fundamental law was adopted in 1792, the provisions of the 1784 constitution providing for public support of "Protestant teachers of Piety" remained intact and were even extended to the constitution of 1912. The dominant position of the Congregationalist Church was nevertheless eroded by a series of legislative acts between 1792-1807 granting exemptions to Episcopalians, Baptists, and Methodists, which ultimately gave rise to a toleration act in 1819 granting complete freedom to all *Christian* sects.[60] Repeated attempts by dissenters to strike the words *Protestant* and *Christian* from the New Hampshire constitution were unsuccessful, however, and both were carried over to the revised constitution of 1889. The requirement that members of the state legislature be of the Protestant religion was not dropped from the state's constitution until 1877.

Similarly, in Massachusetts, the movement toward disestablishment met with heavy resistance. In 1800 the state legislature passed a law requiring each town or parish to provide "a public Protestant teacher of piety." The statute further provided that delinquent towns were liable to heavy fines; and all citizens were required to cover the ministers' salaries and the costs of building and repairing the churches through public taxation.[61] As late as 1832 one Nathaniel P. Fisher was arrested for refusing to pay a tax of $2.38 which had been levied upon him at a town meeting.[62]

Under Massachusetts law, the established church was a town institution, but the choice of ministers remained with the town meeting rather than the church itself. Surprisingly, this eventually worked to the disadvantage and ultimate defeat of the established Congregationalist Church. In 1818, the minister of the town of Dedham resigned. The non-communicants of the town united with the Unitarian minority in the church and at the town meeting a Unitarian was elected pastor. Most members of the church opposed the new pastor and moved their religious services to another location.[63] They subsequently brought suit for possession of the church property, but in *Baker v. Fales* (1820), the Supreme Judicial Court of Massachusetts ruled that they had no right to it. The constitution, stated the Court flatly, "gives to towns, not to churches, the right to elect the minister in the last resort."[64] This decision prompted about half the towns in eastern Massachusetts to elect Unitarian ministers. Thus were the Congregationalists ejected from their own churches, "turned out of house and home by the very powers [they] had contrived to give [them] lasting security." Finally, in 1833, tithes were abolished, the towns were relieved of their responsibilities over church affairs, and the old Puritan church was formally disestablished.[65]

In the middle-Atlantic states, where religious establishment was not so deeply entrenched, dissenters and minority sects encountered fewer obstacles. In 1792, Delaware quietly abandoned the religious oath of office, and in 1844 New Jersey finally discontinued her religious test for office. The New York constitution of 1821 removed the restrictions of the 1777 charter against naturalization of Catholics.[66] Pennsylvania, on the other hand, reached a compromise. The constitution of 1790 extended civil rights to non-believers but at the same time narrowed the liberty of public officeholders by requiring them to acknowledge "the being of God and a future state of rewards and punishments."[67] This requirement was retained in subsequent constitutions of Pennsylvania throughout the remainder of the nineteenth century.

The Old South rather cautiously followed the movement toward disestablishment. In the border state of Maryland, the power of the legislature to lay taxes for the support of the Christian religion was revoked by a constitutional amendment in 1810.[68] But throughout the remainder of the nineteenth century, the state held tenaciously to the constitutional requirement of 1776 that every public officeholder "subscribe [to] a declaration of his belief in the Christian religion." In North Carolina, where officeholders were required to affirm the truth of the Protestant religion under the constitution of 1776, an amendment was passed in 1835 substituting the word "Christian" for "Protestant."[69] By the terms of the constitution of 1876, however, "All persons who shall deny the being of Almighty God" were declared ineligible for public office.[70]

The South Carolina constitution of 1790 formally disestablished the Protestant religion and abolished all religious tests for office.[71] Reflecting a resurgence of religious belief, the constitution of 1868 stipulated, however, that persons denying the existence of God could not take office.[72] Following the Rhode Island and Virginia model, the state of Georgia abolished all religious tests for office in 1789 and did not thereafter reinstate them.[73]

Despite the unique achievements of Madison and Jefferson in the 1780s, religious matters remained unsettled in the Old Dominion. To clarify the issue of whether the Bill of Rights was part of the constitution, the legislature repealed all laws in 1798-1799 seemingly in conflict with the Bill of Rights, thereby sealing the disestablishment of the Episcopal Church. There remained, however, the question of ownership of glebe lands, which had been originally given to the Church by the Crown. Rival sects often laid claim to the glebes on the theory that possession by the Episcopal Church constituted preference of one religion over another. To resolve the issue, the legislature enacted a statute in 1802 providing for the public sale of vacant glebe lands. This left most glebe lands in the hands of the Church. The Church nevertheless challenged the constitutionality of the act, and the Virginia Court of Appeals finally ended the controversy in 1840, affirming the position of the legislature.[74]

The pattern of church-state relations in new states entering the Union after 1789 did not differ substantially from that in the original fourteen. By 1860—and the situation did not radically change for the next three quarters of a century—the quasi-establishment of a specific Protestant sect had everywhere been rejected; quasi-establishment of the Protestant religion was abandoned in most but not all of the states; and the quasi-establishment of the Christian religion still remained in some areas. A new pattern of church-state relations, the multiple or quasi-establishment of all religions in general, i.e., giving all religious sects a preferred status over disbelievers (the No Preference doctrine) became widespread throughout most of the Union. Thus at the turn of the century, for example, no person who denied the existence of God could hold office in such states as Arkansas, Mississippi, Texas, North Carolina, or South Carolina. Arkansas also discharged witnesses in court proceedings who uttered such denials. In Pennsylvania and Tennessee, public office was restricted to persons who "believe in God and a future state of reward and punishment." Maryland required this belief in witnesses and jurors, but for officeholders demanded simply a belief in God.[75] Indeed, a good case can be made to show that during the latter part of the nineteenth and well into the twentieth centuries, the trend was not toward disestablishment but toward a strengthening of the ties between church and state. In the nineteenth century, for example, only one state (Massachusetts, 1826) required Bible reading in the public schools. Between 1913-1930, however, eleven more states enacted similar statutes.[76] Such practices as these are hardly in accord with the putative notion that the Jeffersonian doctrine of church-state relations was increasingly popular from the moment of its inception until it was formally adopted by the Supreme Court.

Needless to say, this cursory treatment here of church-state relations in the late eighteenth and early nineteenth centuries is not intended to be definitive. A bare catalogue of church-state relations in all of the States before and after the adoption of the Constitution would require many volumes. But this survey of state constitutions and organic laws does indicate quite sufficiently that the doctrine of a total separation of church and state, or "no aid of any kind to religion," as the Supreme Court has put it, was not espoused or followed by any significant number of states in the formative era of the American Republic or in the early nineteenth century.

In many of the establishment cases, particularly those decided during the Vinson-Warren period, the Court has nevertheless been at pains to defend its position on historical grounds. From Justice Black's opinion in *Everson* through Clark's in *Schempp* (1963)[77] and the concurring opinions of Justices Douglas and Brennan in *Lemon v. Kurtzman* (1971),[78] there are lengthy discourses on religious liberty purporting to show a national acceptance, throughout American history, of the Jeffersonian proposition that the First Amendment built a "wall of separation" between church and state.

> What strikes the critical student of the Constitution as peculiar is the fact the historical material dredged up by the Court, much of which relates to religious conflict in England in the seventeenth century, is totally irrelevant to the absolutist position the Court is attempting to substantiate, and invariably refers to the consequences and dangers of political aid to one religious sect rather than religion generally.[79]

The Court has consciously based its interpretation of the establishment clause on the historical record. To comprehend the original understanding of separation of church and state, at the least a careful scrutiny of contemporary opinion from 1787 to 1791 and a review of state practices in the early Republic would seem essential. But the Court has made no such effort and has instead confined its historical inquiry to religious persecutions in Europe and the Virginia struggle against the Anglican establishment; and it has treated the rather unique Virginia experience, relying on carefully selected writings of Madison and Jefferson, to be that of the Congress of 1791 and of the nation at large. In the words of Justice Black, the Court has "recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute [of Religious Freedom of 1786].'[80]

Does history support the Supreme Court's assertion that the First Amendment forbids governmental aid to religion? Here is the answer provided by the late Edward S. Corwin: "The historical record shows beyond peradventure that the core idea of 'an establishment of religion' comprises the idea of *preference*; and that any act of public authority favorable to religion in general cannot, without manifest falsification of history, be brought under the ban of that phrase. Undoubtedly the Court has the right to make history, as it has often done in the past; but it has no right to *make it up*."[81] If Justice Clark's attitude on this issue is representative of the Court as a whole, the likelihood that the Court will cast aside Black's absolutism is slim. In *Schempp*, Clark indicated that the Court was weary of historical debate, and that as far as he and other members of the Court were concerned, the proper meaning of the establishment clause was settled. Objections by lawyers and scholars to the Court's distortion of history, declared Clark, "seem entirely untenable and of value only as academic exercises."[82] Significantly, historical inquiry among the Justices into the origin and development of church-state relations, which never commanded the attention of the Court much beyond the pre-constitution experience of Virginia in the first place, has practically vanished since Justice Clark wrote these words. Yet it was Justice Black himself, the author of the *Everson* doctrine, who insisted that "[i]t is never to be forgotten that, in the construction of the language of the Constitution . . . we are to place ourselves as nearly as possible in the condition of the men who framed that instrument."[83] That almost every member of the Court has clung tenaciously to Black's absolutist interpretation of the establishment clause since 1947, in spite of the conflicting historical evidence, while at the same time rejecting his absolutist views on the other provisions of the First Amendment, is a curiosity of modern civil rights law that invites skepticism concerning the Court's self-proclaimed sincerity in seeking out the intent of the Framers in construing the Constitution.

Independent of these considerations, we are reminded that "the Supreme Court as a whole cannot indulge in historical fabrication without thereby appearing to approve the deterioration of truth a criterion for communication in public affairs."[84] The importance of keeping the Court honest is a concern that all free men must share. "To the extent that dignity and honesty in the conduct of human affairs rest on the belief in historical objectivity," observes Sidney Hook, "reflection on it goes to the very heart of the question concerning the nature and possibility of liberal civilization....There is a difference between using our knowledge of the history of the past in order to influence the future...and making or manufacturing a history of the past solely with an eye to achieve our aims."[85]

JURISDICTION AND THE ISSUE OF INCORPORATION

During the Federal Convention of 1787, George Mason of Virginia proposed that a declaration of rights be included in the Constitution; but a motion offered by Elbridge Gerry that a committee be appointed to prepare such a statement was voted down unanimously, it being generally agreed that a bill of rights was not necessary since the expressly enumerated powers of the federal government did not include power over the rights in question. Without much of a struggle, however, the Federalist supporters of the Constitution agreed to the adoption of a bill of rights during the ratification effort in the state conventions. One reason they acceded to Anti-Federalist demands for a bill of rights was that such a declaration changed nothing regarding the constitutional structure, and neither reduced federal power nor increased state power. The Bill of Rights, in other words, simply declared what was already understood by the Framers of the Constitution—*viz.*, that the national government had no authority in the general area of civil liberties. Federalists and Anti-Federalists were in general agreement that the states, not the federal government, would determine under their own bills of rights the meaning and substance of civil liberty within their respective jurisdictions. The debate was thus over the proper wording of the Constitution regarding the *enforcement* of civil liberties rather than their substantive content.[86]

As we previously noted, the Bill of Rights had a dual purpose: to protect each *individual* against the abridgment of civil liberties by the federal government, and to assure each *state* that the federal government would not encroach upon the jurisdiction of the states over such matters. The Bill of Rights, then, is essentially a states' rights document. Each amendment was a guarantee to the individual *and* to the states. Indeed, the federalism of the Bill of Rights was widely regarded in 1791 as far more important than the protection it afforded to the individual.[87] Odd as it may seem today, the First Amendment was not only a guarantee to the individual that Congress could not establish a national religion, but also a guarantee to the states that they were free to determine the meaning of religious establishment within their jurisdictions, and to newly establish, maintain, or disestablish religion as they saw fit.

Particularly significant in this regard is the fact that the First Congress, which proposed the Bill of Rights, rejected an attempt to apply portions of it to the states. The fifth resolution of James Madison's proposed series of amendments for a bill of rights provided that "[n]o *State* shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."[88] Madison's proposal was defeated in the Senate. "This [proposal] is offered," Tucker of South Carolina observed, "as an amendment to the Constitution of the United States, but it goes only to the alteration of the Constitutions of particular States. It will be much better, I apprehend, to leave the State Governments to themselves, and not to interfere with them more than we already do; and that is thought by many to be rather too much."[89]

For nearly a century and a half, the Supreme Court respected these views, thereby securing one of the major objectives of the Bill of Rights. Speaking for a unanimous Court, Chief Justice Marshall declared in *Barron v. Baltimore* (1833) that the first eight amendments "contain no expression indicating an intention to apply them to the state governments."[90] This position was consistently maintained in subsequent decisions involving the First, Fifth, Seventh, and Eighth Amendments between 1833-1868. In *Permoli v. New Orleans* (1845), for example, a unanimous Court upheld a municipal ordinance challenged by the Catholic Church, asserting that "[t]he Constitution makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the State constitutions and laws."[91] And even after the adoption of the Fourteenth Amendment, which forbade any State from denying an individual life, liberty, and property, the Supreme Court continued to follow *Barron*—a fact strongly indicating that the Fourteenth Amendment was not intended by those who witnessed its creation and sought to apply its provisions to defeat the original purpose of the Bill of Rights.[92] As late as 1922, in *Prudential Insurance Co. v. Check*, the Court declared that "neither the Fourteenth Amendment nor any other provision of the Constitution imposes restrictions upon the States about freedom of speech."[93]

The Court suddenly reversed itself in 1925 when if offhandedly remarked in *Gitlow v. New York* that "[f]or present purposes we may and do assume that freedom of speech and of press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and liberties protected by the due process clause of the fourteenth amendment from impairment by the states."[94] Thus began the piecemeal incorporation of the First Amendment into the word "liberty" of the due process clause of the Fourteenth Amendment, reversing *sub silentio* the *Barron* ruling and thereby undermining one of the great objects of the Bill of Rights by applying it to the states. In 1931, in *Near v. Minnesota*,[95] the Court embarked upon the revolutionary course outlined in *Gitlow* by incorporating freedom of speech and press into the Fourteenth Amendment. In subsequent cases, the Court arbitrarily transferred freedom of assembly and freedom of religion[96] to the Fourteenth Amendment, finally completing the incorporation of the First Amendment with the inclusion of the establishment clause in *Everson*.[97]

As Professor Corwin has amply demonstrated, the application of the establishment clause to the states through the due process clause requires a rather bizarre juggling of words and artful manipulation of legal and historical precedents. In the first place, "the principal importance of the [First] Amendment lay in the separation which it effected between the respective jurisdictions of state and nation regarding religion, rather than its bearing on the question of the Separation of Church and State."[98] In other words, it is the federalism of the First Amendment, and the desire of Congress in 1791 to assure the states that the new national government would have no authority over the subject of church-state relations, that explains the underlying purpose of the establishment clause of the First Amendment. The refusal of the Court to recognize this significant aspect of the Amendment has, in the view of Mark de Wolfe Howe, led the Court "to disregard—even to distort—the intellectual background of the First Amendment."[99] The Court, Howe has suggested, has arbitrarily embraced the erroneous idea "that the policies of freedom and equality enunciated in 1868 in the Fourteenth Amendment must be read back into the prohibitions of the First Amendment—the familiar process of incorporation carried out, as it were, in reverse. The consequences may be admirable law, but it is... distorted history."[100] What the delegates in the various state ratifying conventions in 1787-1788 sought

> was a guarantee that the new national government would neither set up a national church nor interfere with the various types of

> establishments, quasi-establishments, and church-government arrangements existing in several states. Thus, New Hampshire proposed an amendment which read: "Congress shall make no laws touching religion. . . ." Since the Constitution of New Hampshire provided special privileges for the Protestant religion, the amendment was very likely aimed at excluding the new government from passing any law that might 'touch' [i.e. alter] their particular type of establishment.[101]

Against this backdrop, it requires no little skill to reconcile the original understanding of the First Amendment with Mr. Justice Rutledge's disingenuous reading of the establishment clause in *Everson*:

> The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.[102]

Unless it be assumed that the establishment clause was an invitation to the national government to interfere with existing church-state relations, Rutledge's generally accepted interpretation of the First Amendment among members of the Court is wholly unhistorical. No such assumption is supportable on the record; indeed a number of the states, as we have seen, already had some form of existing establishment or quasi-establishment at the time of adoption, and it is difficult to believe that they ratified the establishment clause with the understanding that "The First Amendment put an end to placing any one church in a preferred position."[103] One is tempted to conclude, therefore, that the modern Court, by applying the establishment clause to the states, has accomplished the very purpose which that clause was designed to prevent—*viz.*, the involvement of the national government in the religious affairs of the several states.

If it could be demonstrated satisfactorily that the Framers of the Fourteenth Amendment deliberately sought to apply the Bill of Rights to the States, and to reverse both *Barron v. Baltimore* and *Permoli v. New Orleans*, then the original purpose of the establishment clause would not be paramount. The intent of the Framers of 1868 would have superseded that of the Framers of 1791. But again, there is a paucity of evidence to support such a proposition; and there is an abundance of documentary material drawn for the debates of the 39th Congress and contemporaneous newspapers throughout the Union which, thanks to the research of Charles Fairman, points to the conclusion that the Fourteenth Amendment was not intended to confer jurisdiction over the First Amendment to the federal government or upset *Barron*.[104]

With respect to the establishment clause itself, another constitutional scholar has observed that "a conclusive argument against the incorporation theory, at least as respects the religious provisions of the First Amendment, is the 'Blaine Amendment' proposed in 1875."[105] That year, James Blaine of Maine introduced an important resolution in the Senate, upon the recommendation of President Grant, which provided that: "No *State* shall make any law respecting an establishment of religion or prohibiting the free exercise thereof." Significantly, the Congress which considered the Blaine Amendment included twenty-three members of the 39th Congress which adopted the Fourteenth Amendment.

> Not one of the several Representatives and Senators who spoke on the proposal even suggested that its provisions were implicit in the amendment ratified just seven years earlier....Senator Stevenson, in opposing the proposed amendments, referred to Thomas Jefferson: "Friend as he [Jefferson] was of religious freedom, he would never have consented that the States...should be degraded and that the Government of the United States, a Government of limited authority, a mere agent of the States with prescribed powers, should undertake to take possession of their schools and of their religion." Remarks of [other Members of Congress]...give confirmation to the belief that none of the legislators in 1875 thought the Fourteenth Amendment incorporated the religious provisions of the First.[106]

Thus the debates on both the adoption of the Fourteenth Amendment and the rejection of the Blaine Amendment reveal a general understanding among the participants that the Fourteenth Amendment left undisturbed the system of church-state relations established under the Bill of Rights.

CONCLUSION

A strong case can be made to show that the Supreme Court has adopted a constitutional doctrine nationalizing the establishment clause which the Framers of the Bill of Rights and the Fourteenth Amendment clearly rejected. First, the Court ignores the federalism of the First Amendment. The common understanding in 1791, and for more than a century thereafter on the question of church-state relations, is unmistakably clear: A principal underlying purpose of the First Amendment was to prevent the national government from usurping the powers of the states over the subject of church-state relations, and to reaffirm the authority or right of each state to define, without federal interference, the nature of those relations within its own boundaries. The establishment clause, applying only to the federal government, was calculated to prevent not only the establishment of a national church, but to safeguard and leave undisturbed existing relations between church and state at the state and local level. Second, there is serious doubt whether the Fourteenth Amendment was intended by its framers and backers to nationalize the establishment clause. And third, "the prohibition on the establishment of religion by Congress is not convertible into a similar prohibition on the States, under the authorization of the Fourteenth Amendment, unless the term 'establishment of religion' be given an application which carries with it invasion of somebody's freedom of religion, that is, of 'liberty.' "[107] Taken together, these are powerful denials of the Court's right to assume jurisdiction over cases involving state aid to religion.

A Final Note. Since 1975, Senator Jesse Helms (R-NC) has been introducing legislation to deny all federal courts jurisdiction over cases involving voluntary prayer in the public schools, and in 1979 such a measure passed in the Senate.[108] Should such legislation be enacted by Congress, it would represent the first step in the arduous process of restoring the Bill of Rights to its original purpose; for its effect would be to lodge in the highest courts of each state final authority over questions involving such practices. Senator Helms has again introduced this measure in the 97th Congress, and it is expected that the Separation of Powers Subcommittee of the Senate Judiciary Committee will begin consideration of the bill in early 1982. Whether it succeeds or fails, it will serve to focus public attention on the origin and nature of both the establishment clause and the Bill of Rights generally, while possibly generating debate on the doctrine of incorporation itself, certainly a debate going to the very heart of the question of whether it is either wise or proper for nine unelected officials to possess the incredible power of deciding what our freedoms shall be.

REFERENCES

1. The Virginia Declaration of Rights of 1776 proclaimed the principle of religious liberty, but not until 1779 was the Anglican Church disestablished; even so, the complete separation of church and state did not come about until the adoption of the Virginia Statute of Religious Liberty—drafted by Thomas Jefferson and enacted by the Virginia legislature on January 16, 1786.
2. Joseph Story, III, *Commentaries on the Constitution* §1871 (1833) (Emphasis added). For an analysis of Justice Story's position, including his refutation of Jefferson's assertion that Christianity was not a part of the common law, *see* my study of Story's jurisprudence in James McClellan, *Joseph Story and the American Constitution* (Norman, Oklahoma: University of Oklahoma Press, 1971), pp. 118-59.
3. For an extended discussion of this issue, *see* McClellan, *supra* n. 2 at pp. 142-59.
4. *Everson v. Board of Education*, 330 U.S. 1 (1947).
5. *Id.* at p. 8.
6. *Id.* at pp. 15, 16. (Emphasis added.)
7. *Id.* at p. 15. The phrase is taken not from the Constitution, of course, but from a letter which Jefferson wrote to the Baptist Association of Danbury, Connecticut in 1802. It reads in part: "I contemplate with sovereign reverence that act of the whole American people, which declared that *their legislature* should 'make no law respecting as establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and state." [As quoted with emphasis added, in Charles Rice, *Supreme Court and Public Prayer* (New York: Fordham University Press, 1964), p. 63.] The term "their legislature" clearly refers to Congress. Jefferson never suggested that the several states built a "wall of separation" between their governments and religion.
8. *McCollom v. Champaign Board of Education*, 333 U.S. 203 (1948).
9. *Id.* at p. 210. In *Zorach v. Clauson*, 343 U.S. 306 (1952), however, the Court upheld a New York "dismissed time" program of religious instruction which, unlike that in Illinois, dismissed children from public schools at the request of their parents to attend religious class off school grounds. The Court attempted to distinguish the two cases by pointing out that the New York plan did not involve the use of public property during the time of religious instruction. In 1879, a taxpayer attempted to restrain Illinois school authorities, acting under a statute, from allowing a school to be used as a religious meeting house. The Supreme Court of Illinois upheld the law, arguing that "religion and religious worship are not so placed under the ban of the (state) Constitution that they may not be allowed to become recipients of any incidental benefit whatever from the public bodies or authorities of the state." *Nichols v. The School Directors*, 93 Freeman 61 (Illinois) 1879.
10. *Engel v. Vitale*, 370 U.S. 421 (1962).
11. *Id.* at p. 425. In *Chamberlain v. Dade County Board of Instruction*, 377 U.S. 402 (1964), the Court reversed a Florida state Supreme Court ruling which had upheld public school prayers and "devotional" Bible-reading, even though the state court had enjoined the holding of Christmas and Channuka programs and the showing of religious films; and in *Dekalb County Community School District v. DeSpain*, 390 U.S. 906 (1968), the Court upheld a lower court decision holding that a prayer recited in verse form by kindergarten children was still a prayer, although the words "God" and "Amen" had been eliminated from it.
12. *Abington School District v. Schempp*, 374 U.S. 225 (1963).
13. *Board of Education v. Allen*, 392 U.S. 236 (1968).
14. *Id.* at pp. 243-44.
15. *Id.* at p. 243. *See Abington School District v. Schempp*, 374 U.S. at p. 222.
16. *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970).

17. *Compare, Tilton v. Richardson*, 403 U.S. 672 (1971) and *Hunt v. McNair*, 413 U.S. 734 (1973) (The First Amendment does not forbid federal or state grants to church-related colleges for the construction of buildings) to *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (The First Amendment forbids state grants to nonpublic primary and secondary schools for maintenance and repair of existing facilities).

18. *Compare, Everson v. Board of Education*, 330 U.S. 1 (1947) (The First Amendment does not forbid reimbursement for transportation to nonpublic schools) *to Wolman v. Walter*, 433 U.S. 229 (1977) (The First Amendment forbids State funding of field trips for nonpublic schools).

19. *Compare, Board of Education v. Allen*, 392 U.S. 236 (1968) (The First Amendment does not forbid state loans of textbooks to nonpublic schools) *to Wolman v. Walter*, 433 U.S. 229 (1977) (The First Amendment forbids state funding of maps for nonpublic schools).

20. In *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970), the Court upheld property tax exemptions to religious organizations, but in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) ruled that tax relief for tuition payments to nonpublic schools was unconstitutional.

21. *Wolman v. Walter*, 433 U.S. 229, 263 (1977).

22. D. Meiklejohn, *Religion in the Burger Court: The Heritage of Mr. Justice Black*, 10 Indiana Law Review 647 (1977).

23. *Id.*

24. Under the "Duke's Laws" of 1664, every township in the colony of New York was obliged to support a Protestant church and minister. This, in effect, allowed the Dutch Reformed Church to remain as the established church in most localities, since a majority of the settlers were Dutch. In 1686, James II instructed the Royal Governor of New York to establish the Anglican Church in the colony; but the governor failed to act. Finally, in 1693, the colonial assembly enacted a peculiar bill which seemed to establish the Anglican Church in a few designated counties. This confused situation was clarified in 1731 by the provincial court of New York, which accepted the claim of the Presbyterians to hold the Jamaica Church of Queens (sought by the Anglicans) and to collect taxes for its support. This decision allowed each community to establish and support a Protestant church of its own choosing, and the establishment of the Anglican Church was rendered a legal fiction. *See* Sanford Hoadley Cobb, *The Rise of Religious Liberty in America*, (New York: Johnson Reprint Corporation, 1970).

25. William Sweet, *The Story of Religion in America* (New York: Harper Publishing Company, 1950), p. 189.

26. Benjamin Perley Poore, I, II, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the United States* (Washington, D.C.: Government Printing Office, 1877), pp. 1596-97.

27. Cobb, *supra* n. 24, p. 501.

28. Poore, II, *supra* n. 26, pp. 1280-81.

29. *Id.* at p. 1286.

30. *Id.* at I, p. 957.

31. *Id.* at p. 970.

32. *Id.* at II, p. 1859.

33. *Id.* at p. 1861.

34. Cobb, *supra* n. 24, p. 517. Vermont was originally claimed by Massachusetts, New Hampshire, and New York. At the outbreak of the Revolution she sought independence not only from Great Britain but from these States as well. In 1781 and 1782, New Hampshire and Massachusetts assented to her independence, but it was 1790 before New York consented to Vermont's formal admission into the Union.

35. Poore, *supra* n. 26, at II, p. 1339.
36. Story, *supra* n. 2, at I, §114.
37. Poore, *supra* n. 26, at II, p. 1313. The 1776 Constitution provided further that no person should "ever be obliged to pay tithes, taxes or any other rates, for the purpose of building or repairing any other church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right, or has deliberately or voluntarily engaged himself to perform."
38. *Id.* at I, p. 276.
39. Cobb, *supra* n. 24, p. 483.
40. Poore, *supra* n. 26, at II, p. 1541.
41. *Id.* at p. 1543.
42. *Id.* at I, p. 819. The protection of religious liberty was restricted to "all persons professing the *Christian* religion." The term "Christian" rather than "Protestant" was used apparently because of the presence of a large Catholic population.
43. *Id.* at II, p. 1413.
44. *Id.* at pp. 1626-27.
45. *Id.* at I, p. 383.
46. Reba Carolyn Strickland, *Religion and the State of Georgia in the Eighteenth Century* (New York: Columbia University Press, 1939), p. 164.
47. Poore, *supra* n. 26, at I, p. 379.
48. Cobb, *supra* n. 24, pp. 490-92.
49. *Id.* at pp. 493-94.
50. *Id.* at pp. 495-97.
51. *Id.* at pp. 497-98. *See*, Leonard Williams Levy, *Judgments: Essays on American Constitutional History* (Chicago: Quadrangle Books, 1972), pp. 200-01.
52. In Massachusetts, for example, "(i)t was not an establishment like that of the Church of England. . . because the Legislature had no power to regulate doctrine and enforce conformity; and because dissenters received a share of the taxes levied for religious purposes. Consequently, it is more technically accurate to describe the Congregationalist order as favored rather than legally established in Massachusetts." John Francis Thorning, *Religious Liberty in Transition* (Washington, D.C.: The Catholic University of America, 1931), p. 27.
53. Cobb, *supra* n. 24, p. 507. Actually four states excluded ministers from public office, after Georgia adopted a new constitution in 1789. *See* Article I, §18 in Poore, *supra* n. 24, at I, p. 385.
54. Thorning, *supra* n. 52, p. 3. *See also* Cobb, *supra* n. 24, p. 510. Issac Cornelison, *The Relation of Religion to Civil Government in the United States of America* (New York: Putnam, 1895), pp. 95, 111.
55. Thorning, *supra* n. 52, p. 7.
56. Cobb, *supra* n. 24, p. 512.
57. Poore, *supra* n. 26, at I, p. 259.
58. *Id.* at p. 264.
59. Cobb, *supra* n. 24, p. 517.
60. *Id.* at p. 516.
61. Cornelison, *supra* n. 54, p. 106.
62. *Id.* at p. 108.
63. *Id.* at p. 109.
64. *Baker v. Fales*, 16 Massachusetts 487 (1820).
65. Cornelison, *supra* n. 54, p. 110. Religious tests for office were abolished at the State constitutional convention of 1820.
66. *See*, Poore, *supra* n. 26, pp. 278-88 (Delaware); II, pp. 1314-25 (New Jersey); II, pp. 1341-51 (New York).

67. *Id.* at II, p. 1554.
68. *Id.* at I, p. 832.
69. *Id.* at II, p. 1418.
70. *Id.* at p. 1446.
71. *Id.* at pp. 1632–3.
72. *Id.* at p. 1663.
73. *See id.* at I, pp. 384–426.
74. Cobb, *supra* n. 26, pp. 511–12.
75. *Id.* at p. 520.
76. Pennsylvania, 1913; Delaware and Tennessee, 1915; New Jersey, 1916; Alabama, 1919; Georgia, 1921; Maine, 1923, Kentucky, 1924; Florida and Idaho, 1925; Arkansas, 1930. Avin Johnson and Frank Yost, *Separation of Church and State in the United States* (New York: Greenwood Reprint Company, 1948), p. 33.
77. *Abington School District v. Schempp*, 374 U.S. 203 (1963).
78. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
79. McClellan, *supra* n. 2, pp. 135–36.
80. *Everson v. Board of Education*, 330 U.S. 13 (1947).
81. Edward S. Corwin, "The Supreme Court as a National School Board," as reprinted in *A Constitution of Powers in a Secular State* (Charlottesville, Virginia: Michie Company, 1951), p. 116.
82. *Abington School District v. Schempp*, 374 U.S. at p. 217.
83. *Adamson v. California*, 332 U.S. 72 (1947). "An Amendment to the Constitution should be read," said Justice Frankfurter in the same case, "in a sense most obvious to the common understanding at the time of its adoption." *Id.* at p. 63.
84. Charles Miller, *The Supreme Court and the Uses of History*, (Cambridge, Massachusetts: Harvard University Press, 1969), p. 195.
85. Sidney Hook, as quoted in Miller, *id.*
86. In *The Federalist* No. 45, James Madison explained that "the powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, *liberties* and properties of the people; and the internal order, improvement and prosperity of the State." *The Federalist* p. 303 (Modern Library Edition).
87. Six of the States which ratified the Constitution before it went into effect proposed lengthy lists of amendments. "It has frequently been stated that the motive behind these amendments was a desire to secure greater protection for the natural rights of the people. This is true only in part. An examination of the proposals of the first three states to make them, Massachusetts, South Carolina, and New Hampshire, will afford sufficient evidence of the fact that the members of these conventions were much more perturbed about the rights and powers of the states than about the rights of the people." Massachusetts proposed nine amendments but only the sixth, referring to indictment by grand jury, dealt with individual liberty as such. In one place the short list proposed by South Carolina makes mention of "the freedom of the people," but otherwise it deals with the issue of the "sovereignty of the states." Of the twelve proposed amendments offered by New Hampshire, only the last three have a direct bearing on individual liberty. Only Virginia and North Carolina, it seems, proposed a true bill of rights to the people. Benjamin Wright, *American Interpretations of Natural Law* (Cambridge, Massachusetts: Harvard University Press, 1931), p. 147.
88. As quoted in McClellan, *supra* n. 2, p. 147.
89. *Id.* at pp. 147–48.
90. *Barron v. Baltimore*, 7 Peters 250 (1833).
91. *Permoli v. New Orleans*, 3 Howard 609 (1845).

92. *See* C. Warren, *The New "Liberty" Under the Fourteenth Amendment*, 34 Harvard Law Review 436 (1926).

93. *Prudential Insurance Company v. Cheek*, 259 U.S. 530 (1922).

94. *Gitlow v. New York*, 268 U.S. 666 (1925).

95. *Near v. Minnesota*, 283 U.S. 697 (1931).

96. *DeJonge v. Oregon*, 299 U.S. 353 (1937) [freedom of assembly]; *Cantwell v. Connecticut*, 310 U.S. 296 (1940) [Free exercise of religion].

97. Since 1961 the doctrine of incorporation has been extended beyond the First Amendment to the Fourth, Fifth, Sixth, Eighth and Ninth Amendments. *See e.g., Duncan v. Louisiana*, 391 U.S. 145 (1968).

98. Corwin, *supra* n. 81, p. 106.

99. Mark Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History*, (Chicago: University of Chicago Press, 1965), p. 31.

100. *Id.*

101. Francis O'Brien, *Justice Reed and the First Amendment*, (Washington, D.C.: Georgetown University Press, 1958), p. 134. The significance of the word "respecting" in the establishment clause should thus be noted: Congress is to make no law "respecting" (i.e., dealing with the subject of) the establishment of religion, so that existing church-state relations in each State shall remain undisturbed. In the words of Justice Story: "the whole power over the subject of religion is left exclusively, to the State governments, to be acted upon according to their own sense of justice, and the State constitutions." Story, *supra* n. 2, at III, §1873. Jefferson embraced the same view: "I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made respecting the establishment or free exercise of religion, but from that also which reserves to the States the powers not delegated to the United States. Certainly, no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the General Government. It must then rest with the States...." Jefferson to Rev. Samuel Miller, XI, *The Writings of Thomas Jefferson* (Washington, D.C.: Andrew Lipscomb Co., 1903-04, issued under the auspices of the Thomas Jefferson Memorial Association of the United States), p. 428.

102. *Everson v. Board of Education*, 330 U.S. 1, 31 (Rutledge, J. concurring).

103. *Engel v. Vitale*, 370 U.S. at p. 442 n. 7 (Douglas, J. concurring).

104. *See* C. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 Stanford Law Review 5-139 (1949).

105. O'Brien, *supra* n. 101 at p. 116.

106. *Id.* at pp. 116-17. "A majority of people in any state in this union can, therefore, if they desire it," said Blaine in an "open letter" to *The New York Times*, "have an established church..." Francis O'Brien, *The States and 'No Establishment': Proposed Amendments to the Constitution Since 1798*, 4 Washburn Law Journal 188 (1965). Between 1876-1930, notes O'Brien, nineteen separate amendment proposals were introduced without success in Congress for the purpose of making the religious provision of the First Amendment binding on the States. *Id.* at p. 210. *See also* A. Meyer, *The Blaine Amendment and the Bill of Rights*, 64 Harvard Law Review 939 (1951).

107. Corwin, *supra* n. 81, at p. 116. Under the doctrine of incorporation, the Court interprets the word "liberty" of the due process clause to include the absence of an established religion, even though it is not a personal liberty like freedom of speech, press, assembly or religion that an individual can exercise. Nevertheless, it is not necessary, according to the Court, for parties protesting state religious programs to produce evidence that their religious liberty has in any way been abridged. As the Court asserted in *Schempp*: "It goes without saying that the laws and practices involved here can be challenged only by persons having standing to complain.

But the requirements for standing to challenge state action under the establishment clause, unlike those relating to the free exercise clause, do not include proof that particular religious freedoms are infringed." *Abington School District v. Schempp*, 374 U.S. at p. 224. Why the requirements should not be the same for the free exercise clause and the establishment clause the Court has not explained. Moreover, there is a compelling argument that by its actions the Court itself has denied the right of free exercise to a majority of public school children, who are in effect compelled through a combination of federal court rulings and state compulsory school attendance laws to shed their constitutional rights of religious freedom while under the control of government authorities.

108. The Helms Amendment to S. 210, 96th Cong., 1st Sess. was subsequently shifted to S. 450, a bill dealing with the jurisdiction of the Supreme Court. The House Judiciary Committee, however, refused to take action on the measure. *See* Gerald Gunther, *Constitutional Law* (Mineola, New York: Foundation Press, 1979 Supplement) pp. 1-2. Proposed amendments to the Constitution to reverse the Prayer Decision have been introduced in most sessions of Congress since 1962, that sponsored by Everett Dirksen (R.-Ill.) achieving the widest support. On September 21, 1966, Dirksen carried a majority with him, but the vote of 49-37 fell short of the two-thirds majority necessary to propose a constitutional amendment. Dirksen's proposed amendment (S.J. Res. 148) was one of 150 measures introduced in the 88th Congress to reverse the Court's holding in the Prayer Decision. *See* Congressional Quarterly, II *Congress and the Nation*, pp. 410-11 (1969).

The CHAIRMAN. I want to express my appreciation to all of you gentlemen. I also want to express my appreciation to all who have come and testified this morning. We are very pleased to have these witnesses come and express themselves, and we are proud that we live in a country where the citizens have a right to petition the Government, to come and give their views as to legislation pending. That is exactly the opportunity we wanted to afford here.

Now, we are going to recess until 1:30, at which time, I believe the Democrats are to preside this afternoon. So we will now stand in recess until that time.

[Whereupon, at 12:45 p.m., the committee was recessed, to reconvene at 1:30 p.m. this same day.]

[Whereupon, at 2:45 p.m., the committee reconvened, Hon. Patrick J. Leahy, presiding.]

Senator LEAHY. I am Patrick Leahy. I am not the chairman of the committee, nor one of the majority members of the committee.

It is unfortunate—apparently, these hearings were scheduled by the committee and by the chairman, and apparently, also at the same time that he is scheduled to be on the floor for the abortion amendment. It is regrettable that abortion and school prayer were scheduled for the same time. I cannot nor do I speak for the chairman of the subcommittee, although I understand that he and his committee staff have accepted the request of all the people who are here to speak, and they are indeed welcome.

What I would suggest we do is that we bring up the first panel, panel 5, the American Civil Liberties Union, Americans United for Separation of Church and State, and People for the American Way. If they would just join us at the witness table.

Congressman, it is good to see you here again.

Mr. BUCHANAN. Thank you, Senator.

Senator LEAHY. It is a bit too long, I must say, but we are delighted to see you here.

What I think we will do is have the panel begin, and I would leave it to you three gentlemen, whichever one of you would like to start first. I understand Senator DeConcini is going to come over at some point and will continue with the hearings.

I will probably have to leave to go back to the hearing that I was originally going to be at, and if I have to leave during that time, the hearing will continue, however, and staff will continue to take the testimony.

I might suggest that because of the delays, and because of the people who now are lined up, that we might keep statements to 5 minutes, if we could. The whole statement, of course, will be made part of the record.

Gentlemen, please proceed.

STATEMENT OF A PANEL, INCLUDING JOHN H. BUCHANAN, JR., ON BEHALF OF PEOPLE FOR THE AMERICAN WAY; W. MELVIN ADAMS, EXECUTIVE DIRECTOR, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; AND DAVID LANDAU, LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERTIES UNION

Mr Buchanan. Thank you, Mr. Chairman.

First, let me say, I am John Buchanan, and I am here on behalf of People for the American Way, of which I am national chairman.

Mr Chairman, I am constrained to say I share your regret at the way the hearings were scheduled and at the conduct of the hearings to this point, in that as a Republican who served for 16 years in the Congress, I deeply believe in what the founder of my Party had to say about government of the people, by the people, and for the people, and its importance to our society. And for those of us who represent, in my case, 110,000 Americans, and in other cases up to several million Americans, who have been given a day of hearings on a matter we consider of first importance, it is regrettable that people like the United Methodist Church, the Episcopal Church, several important school entities, the Seventh Day Adventists, and many others have not, perhaps, had the opportunity they expected in testifying on this important matter.

So I would not be offended should you convey to my Republican friends on this committee that feeling.

Senator LEAHY. I might say—and before we start the clock on your time, so this will not come out of your time at all—I might say that I share the concern. I share it also as a parent, and one who has had my children both in parochial schools and in public schools—in parochial schools when they were going to school in Vermont before I was in the Senate; after I was elected to the Senate, I decided that because I would be in Congress during most of the school year, I wanted the children down here, and they have gone to public school here. One of the compelling reasons why they went to the parochial schools in Vermont was because they said the same prayers at school that we said at home, and I wanted them to go there, and I also had some control over it, paid tuition, and knew exactly what prayers would be said there. In the public school, of course, it is an entirely different thing. I am sure that whatever the school board might direct as a prayer there would not be the same prayers that we would be saying at home, and so my conservative Vermont nature comes out, and I am kind of happy that they do not direct the kids to say a prayer.

So I was hoping that there would be some expressions of some balance in these hearings, as I am sure there will be by the time everybody testifies.

So now we will begin your time, and I will convey your thoughts. Thank you.

Mr. BUCHANAN. Thank you, Mr. Chairman.

People for the American Way is a nonprofit, nonpartisan, educational project formed in the fall of 1980 to protect and promote Americans' constitutional freedoms, especially those contained in the first amendment.

We are opposed to this and any other attempt to amend the first amendment. While we welcome the opportunity to participate in this debate, it is somewhat troubling that we are today talking about amending the very constitutional amendment that allows me to sit here and petition my Government. The awesomeness of tampering with any part of the first amendment should give us all pause. A very heavy burden of proof should be required of those advocating the change.

The proponents of the school prayer amendments have failed to make their case primarily because they misstate what the law is today and what their amendments would do if passed. President Reagan says the Supreme Court "has effectively removed prayer from our classrooms"—but it is only Government—prescribed, institutionalized prayer that the Court has proscribed.

The President has maintained that his amendment will restore the right to pray, but on this very day, students can, if they wish, pray either singularly or in groups in public schools or other public buildings without violating the Constitution, subject only to a very few limitations: religious exercises cannot interfere with the school's other activities; the prayer cannot be sponsored by or appear to be sponsored by the governing body, and the prayer must be truly voluntary.

Prayer amendment proponents claim that they want to restore a widespread practice in public schools, and yet most children in the West and Midwest never engaged in prayer in school before the Supreme Court's decision in 1962.

Proponents claim the amendment is needed because the Supreme Court has banned all religion from public schools, but the only practices prohibited are mandatory religious exercises, not the study of religion or religious materials. For example, students may and do study the Bible for its ethical, literary, and historical qualities; they can and do study comparative religion; they can and do recite officially approved anthems with declarations of faith in a deity.

Neither the Bible nor moral instruction has been banned from the schools, nor is there a ban on students meeting voluntarily for religious reasons. In the recent 7-to-2 decision of *Widmar* v. *Vincent,* the Supreme Court said that religious activities are permissible on public school property.

The amendment we all testified against last year and which was resubmitted this year as Senate Joint Resolution 73 has been effectively dissected and discarded. The latest version proposed by Senator Hatch should be viewed in one of two ways. Either it is basically the same as the President's amendment, as some who wanted to testify were told, and therefore is subject to the pitfalls outlined above, or it is totally meaningless—meaningless because equal access is already to be found in the Constitution, and periods of silent meditation in public schools have never been found to be unconstitutional.

What I find disturbing is the lack of appreciation of the genius of the Founders in crafting the first amendment, especially in light of the way it has worked for the past 200 years. Let us recognize that the United States has avoided the secular strife of the Northern Irelands, the Irans, the Indias, and the Pakistans, thanks in large part to the tradition of the first amendment. There were times in the not-so-distant past when the Government tracked down people who believed, as I do, as a Southern Baptist. It was not too long ago that Baptist ministers were beaten, imprisoned and run out of town in the Colony of Virginia for preaching doctrine at variance with that of the established church. Government can be benevolent, but government can also be bigoted. Some forces behind this amendment would take us back to the day when one person's religion could be imposed on another.

Too often recently have I heard school prayer proponents make statements not unlike that of Deputy Attorney General Edward Schmults: "We must teach minorities to respect the right of the majority." How frightening that statement is, and how antithetical to our history. And who knows who will be in the majority or minority tomorrow?

I am also very concerned about what the passage of this amendment might mean for our schools, already so overburdened. With today's problems, the last thing administrators, teachers, and students need is to be thrust into sectarian strife.

Mr. Chairman, the religious instruction of children is the responsibility of parents and their churches. It is clearly neither the responsibility nor the constitutional right of government or the public schools. Protecting the constitutional rights of American citizens is the solemn responsibility of the courts and the Congress.

We at People for the American Way prayerfully hope that the Congress will take no action to dilute the first amendment, so hard won by our Founding Fathers, so protective of our sacred rights, and so much more important to the welfare of our children and of their children's children than Government-sponsored prayers in school could ever be to anyone's child.

Mr. Chairman, we urge the committee not report and the Senate not pass Senate Joint Resolution 73.

Senator **Leahy**. Thank you very much.

[The following was received for the record:]

PREPARED STATEMENT OF JOHN H. BUCHANAN, JR.

Mr. Chairman and Members of the Committee:

My name is John Buchanan and I am here today on behalf of People For the American Way, a nonprofit, nonpartisan, educational project formed in the fall of 1980 to protect and promote Americans' constitutional freedoms, especially those contained in the First Amendment. I am pleased to appear today on behalf of PEOPLE FOR to present our views on the proposed amendments on school prayer.

We are opposed to this and any other attempt to amend the First Amendment, but we welcome the opportunity to participate in this debate. It is a sign of the health of this society that once more we are arguing over the meaning of the First Amendment as it relates to religion. British Ambassador James Bryce observed about Americans one hundred years ago that Americans have no two identical opinions, only a favorable one, on the principle of religious freedom, voluntary religious life, and a distancing between church and state. Each time Americans engage in this debate, we are reminded of the rich diversity of religious faiths in the United States and of our Founders' wisdom in drafting the First Amendment that has so well protected our rich diversity.

However, it is somewhat troubling that we are today talking about amending the very constitutional amendment that allows me to sit here and petition my government. The awesomeness of tampering with any part of the First Amendment should give us all pause.

When we talk about amending the Bill of Rights, it seems to me that a very heavy burden of proof should be required of those advocating the change. The proponents of the school prayer amendments have failed to make their case primarily because they misstate what the law is today and what their amendments would do, if passed.

There may be some sociological principle that the higher the emotional content of an issue, the greater the number of misrepresentations and misstatements about the issue. If there is not such a principle, then we should invent one for the school prayer debate. The misstatements are legion. I will discuss five.

(1) President Reagan says that the Supreme Court "has effectively removed prayer from our classrooms"--

BUT -- it is only government-prescribed, institutionalized prayer that the court has proscribed.

(2) The President has maintained that his amendment will restore the right to pray--

BUT -- on this very day students can if they wish, pray either singularly or in groups in public schools or other public buildings without violating the Constitution, subject only to a very few limitations:

- religious exercises cannot interfere with the school's other activities;
- the prayer cannot be sponsored by, or appear to be sponsored by, the governing body; and
- the prayer must be truly voluntary.

(3) Prayer amendment proponents claim that they want to restore a widespread practice in public schools--
BUT -- most children in the West and Midwest never engaged in prayer before the Supreme Court's decision in 1962. [See attached L.A. Times article of 8/27/82]

(4) Some prayer advocates even go so far as to blame the decline in our schools on the Supreme Court decisions of 1962 and 1963--

BUT -- this cause and effect logic is best dealt with in humor. As Martin Marty has reasoned:

> Why did everything go wrong when everything went wrong? I think that the divorce rate rose shortly after the invention of the Electronic Church. Check the coincidence of the dates. When born-again celebrities started writing born-again autobiographies, teen-age pregnancies increased; and when fundamentalists started writing sex manuals, the Vietnam War accelerated. Didn't you notice the cause-and-effect relation?

(5) Proponents claim the amendment is needed because the Supreme Court has banned all religion from public schools--

BUT -- the only practices prohibited are mandatory religious exercises. Not the study of religion or religious materials. For example, students may and do study the Bible for its ethical, literary, and historical qualities; they can and do study comparative religion; they can and do recite officially approved anthems with declarations of faith in a Deity.

Neither the Bible nor moral instruction has been banned from the schools. Nor is there a ban on students meeting voluntarily for religious reasons. In the recent 7-2 decision of Widmar vs. Vincent, the Supreme Court said that religious activities are permissible on public school property.

The amendment we all testified against last year and which was resubmitted this year as S.J. Res. 73 has been effectively dissected and discarded. The latest version proposed by Senator Hatch should be viewed in one of two ways. Either it is basically the same as the President's amendment, as some who wanted to testify were told, and therefore is subject to the pitfalls outlined above, OR it is totally meaningless. Meaningless because equal access is already to be found in the Constitution and periods of silent meditation in public schools have never been found to be unconstitutional.

What I find disturbing is the lack of appreciation of the genius of the founders in crafting the First Amendment, especially in light of the way it has worked for the past 200 years. Let us recognize that the United States has avoided the secular strife of the Northern Irelands, the Irans, the Indias and the Pakistans, thanks in large part to the tradition of the First Amendment. There were times in the not so distant past when the government tracked down people who believed as I do as a Southern Baptist. It was not too long ago that Baptist ministers were beaten, imprisoned and run out of town in the Colony of Virginia for preaching doctrine at variance with that of the established church. Government can be benevolent, but government can also be bigoted. Some forces behind this amendment could take us back to the day when one person's religion would be imposed on another.

Too often recently have I heard school prayer proponents make statements not unlike that of Deputy Attorney General Edward Schmults: "We must teach minorities to respect the right of the majority." How frightening that statement is and how antithetical to our history. And who knows who will be in the majority or minority tomorrow.

I am also very concerned about what the passage of this amendment might mean for our schools -- already so overburdened. With today's problems, the last thing administrators, teachers, and students need is to be thrust into sectarian strife. A recent editorial in USA Today (5/18/83) said it well:

> It is a shame for Americans to waste so much passion when so many more important battles need to be fought. The real peril facing education has nothing to do with Bible teaching but, as a national commission recently pointed out, mediocrity in the schools.
>
> When schools become a battleground for adult passions and prejudices, children are the inevitable casualties. It is their parents who need to learn one of the more elementary Bible lessons: Love thy neighbor.

Once again, I find myself in agreement with John F. Kennedy. In a news conference two days after the 1962 Supreme Court decision on prayer, President Kennedy said that the "easy remedy" for Americans against the edict was to "pray a good deal more at home and attend our churches with a good deal more fidelity."

Mr. Chairman, the religious instruction of children is the responsibility of parents and their churches. It is clearly neither the responsibility nor the constitutional right of government or the public schools. Protecting the constitutional rights of American citizens is the solemn responsibility of the courts and the Congress.

We at People For the American Way prayerfully hope that the Congress will take no action to dilute the First Amendment, so hard won by our Founders, so protective of our sacred rights and so much more important to the welfare of our children and of their children's children than government-sponsored prayers in school could ever be to anyone's child.

Mr. Chairman, we urge that the Committee not report and the Senate not pass S.J. Res. 73.

[From the Los Angeles Times, Aug. 27, 1982]

RESURRECTED SURVEY BELIES CALL FOR THE RETURN OF SCHOOL PRAYERS

(By John Dart)

Contrary to the Reagan Administration's claims that its proposed school prayer amendment would restore a widespread practice in public schools, most children in the West and Midwest never uttered an amen in class before the Supreme Court's 1962 ban.

A seldom-cited survey taken 22 years ago has resurfaced recently to dispute a central rationale for legalizing "voluntary" prayer in public schools.

The study indicated that homeroom devotionals were a common practice only in the Northeast and the South. But more than 91% of the school systems in the West and 74% in the Midwest said none of their schools conducted prayers in class according to the survey by Richard B. Dierenfield of Macalester College in St. Paul, Minn.

His study, based on a 50% return of 4,000 questionnaires, was published in 1962, the year that the U.S. Supreme Court first ruled against state-sponsored prayers for devotional purposes. The court reaffirmed its ruling in 1963.

FREQUENT LEGISLATIVE ATTEMPTS

Legislative attempts have been made frequently since then to permit prayer in some form in public schools. The argument usually turns on whether the First Amendment stricture against government "establishment" of religion would be violated, as the Supreme Court said previous practices did.

President Reagan fulfilled a campaign promise last May by presenting a proposed constitutional amendment to permit voluntary school prayer.

A White House background paper said school prayers had been "a widespread practice for 170 years" and Reagan's message to Congress said the proposed amendment would "allow prayer back in the schools."

A similar motive was mentioned by U.S. Deputy Atty. Gen. Edward C. Schmults in testimony before the Senate Judiciary Committee on Aug. 19.

ADMINISTRATION DISPUTED

An opponent of the amendment, the Americans United for Separation of Church and State, cited the Dierenfield study in disputing the Administration's view of the past, said Albert Menendez, research director for the organization.

But Menendez said he has heard few other participants in the school prayer testimony and public debates cite figures on how prevalent prayer had been in schools. In some states, including California, religious devotions had been barred by educational codes well before 1962.

Attorney Leo Pfeffer, a longtime Jewish spokesman for principles of church-state separation, has usually said prayers were being said in one-third to one-half of the nation's public schools before 1962. Menendez said that estimate matches the Dierenfield findings that 33% of U.S. school systems had prayer, 17% had some schools using prayer and 50% had none.

CHANCES CALLED SLIM

The proposed amendment's chances for congressional approval this year are slim, analysts say, because of the lack of time left before an expected early October adjournment in this election year.

While some Senate activity is expected after Labor Day, the chances of the amendment getting out of committee to the House of Representatives floor are "nil," according to Forest Montgomery, counsel for the National Assn. of Evangelicals public affairs office in Washington.

Many of the same arguments for and against prayer in schools are sure to be recited again before the 98th Congress, if the measure fails this year.

More accurate arguments and some fine-tuning of terminology are in order, participants indicate.

AMENDMENT QUOTED

The NAE's Montgomery said that his organization, which backs a prayer amendment, uses the word "restore" but meaning "to restore a better balance between the establishment and free exercise of religion clauses in the First Amendment."

The amendment proposed by Reagan reads: "Nothing in this Constitution shall be construed to prohibit individual or group prayer in public schools or other public institutions. No person shall be required by the United States or by any State to participate in prayer."

James C. Corman, a former congressman from the San Fernando Valley and now a Washington attorney, insisted to the Senate Judiciary Committee on Aug. 18 that "no child has ever been prohibited from praying in the public schools."

In other words, a child may say an inaudible prayer in class. But that is unsatisfactory to prayer backers. "How is such a policy superior to that of an atheistic state like the USSR?" asked one evangelical newsletter.

Television evangelist Pat Robertson echoed many proponents by pointing to polls which show most Americans favor a prayer amendment. Church officials who have opposed it "do not speak for the rank and file of the American people," Robertson asserted.

TEEN-AGERS' VIEW DIFFERS

Recent Gallup Polls show that of Americans familiar with the proposed constitutional amendment 79% are in favor and 16% oppose. That ratio differed from that of teen-agers, asked by Gallup pollsters if they would favor regular time set aside for prayer in their public schools; 45% were opposed and 42% in favor.

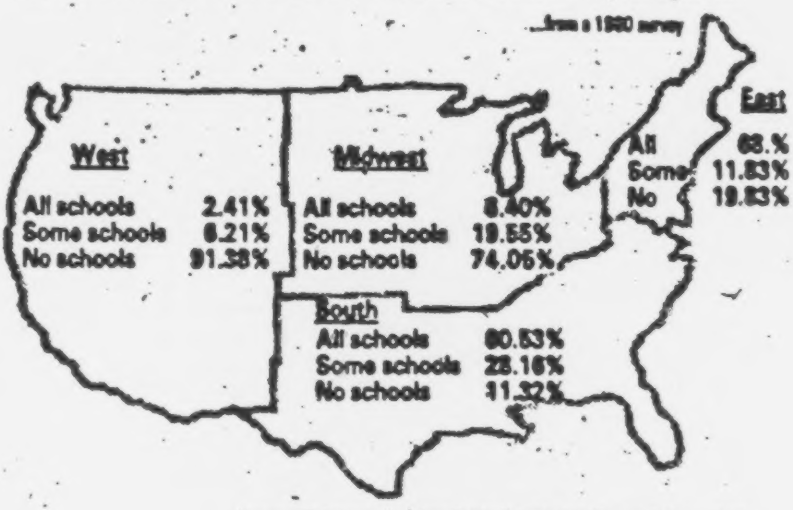
That same Gallup Associated Press Youth Survey discovered that 6% of teens who attend public schools say prayers are said at a regular time—despite court rulings.

A frequently cited objection to allowing school prayers is that no meaningful prayer could be found to satisfy the parents of children wishing to participate because of the religious diversity in America.

Gallup has found, however, that relatively few Americans look to the schools, and progressively less to the church, for spiritual development of their children.

A "meaningful" prayer in the schools thus appeared unimportant to most respondents, who tended to say they saw no reason to deny schools and communities the opportunity to conduct devotional exercises

Are homeroom devotional services held in the schools of your system?



Source: "Religion in American Public Schools," by Richard B. Dierenfield

Senator LEAHY. We will go now to Americans United for Separation of Church and State.

Mr. Adams?

STATEMENT OF W. MELVIN ADAMS

Mr. ADAMS. Thank you, Mr. Chairman.

My name is Melvin Adams. I understand that our full testimony will be recorded.

Senator LEAHY. Yes, sir, it will.

Mr. ADAMS. Thank you.

I am the executive director of Americans United for the Separation of Church and State. Americans United is a 35-year-old organization that is dedicated solely to the preservation of religious liberty and church-state provisions of the first amendment of the Constitution.

We represent through our membership individuals of conservative and liberal political persuasions as well as the full spectrum of religious faiths and those who are not connected with religion in any way. But all are concerned with preservation of religious liberty.

We are very concerned with the Hatch amendment because it seeks to address a problem before it has been dealt with by the courts. The Supreme Court has never ruled that truly voluntary individual prayer, group silent prayer, or meditation in public school violate the first amendment. The Court has never construed that the first amendment prohibits access of voluntary religious groups from public school facilities. It is imperative to allow the Court to address these items before taking the drastic step of a constitutional amendment.

By using such terms as "silent prayer" and "meditation," the Hatch amendment is obviously attempting to reduce the religious exercise to a minimum, thereby reducing the opposition to a minimum and apparently, hoping in some way to introduce some kind of religious exercise into the public schools.

I think we should ask the question: What is the object, what is the goal of those who propose school prayer?

Last fall, I was given an answer at least from one individual. A panel was discussing prayer in the public schools. One of the members was an attorney, very active among the groups promoting school prayer. I suggested to this gentleman that he teach his children to have silent prayer at their desks before the bell rang and before school would begin. His answer was very clear. He indicated that was not enough. He wanted the Government, he said, to recognize religion, and he said, this is just the first step. I think we need to realize that what we are talking about today is not a final, but it is the first step in many people's thinking.

Americans United also oppose the "equal access" section of the Hatch amendment, because the wording is very vague; it is fraught with problems. We accept the concept of "equal access," but there is nothing in this to prevent the school from using its public address system, its teachers, its bulletin boards, its school papers or otherwise to advocate religion. There is nothing to prevent the clergy or outside religious organizations from swarming into the school and using the school as a platform for church activities and evangelism.

Speaking of the original Supreme Court school prayer decision, President John Kennedy reminded us 20 years ago that the practice of prayer and religious devotion is best-suited to the home, the church, and the synagogue, and his advice is good today. In fact, it was the advice and the philosophy of my parents. I learned to pray at my mother's knee. In my home, we had worship in the morning and in the evening, when we all took part in prayer. We prayed before each meal. We prayed before going to bed at night. In fact, I come from a long line of praying people. My grandfather, who was a minister, had the same philosophy with his family and his prayers. My father was a minister. My four uncles were ministers. They all had the same philosophy. There was prayer. My brother and I are both ministers. My two sons are ministers—all with the same philosophy of prayer. They are all opposed to school-sponsored prayers or organized prayers—in the public schools.

I have rehearsed this little bit of personal history because of something that took place here in the Congress—or rather, I should say, on the Hill—this last Thursday. At that time, on the Capitol Grounds, a film was shown entitled, "School Prayer—Now or Never." The film charged that church-state separation is a concept "straight out of Moscow." Senator Jesse Helms appeared in the film and arranged, I understand, for its showing. I am shocked, Senator, that such shameless, McCarthyite "red-baiting" would take place in our Nation's Capitol. As an ordained minister of the gospel, I am appalled that supporters of Government-sponsored school prayer feel free to slander those of us who are born again, Bible-believing, praying Christians, because we oppose them, because we are defending the religious liberty provisions of the first amendment.

Mr. Chairman, the tactics used by some of these proponents of this amendment raise serious questions about their intent. I think we need to remember what they are telling us. This is the first step. We believe that the intent is to create an hysterical atmosphere which can rush this thing through and which might rightly be called a new McCarthyism.

Americans United urges the defeat of the Hatch amendment and Senate Joint Resolution 73.

Thank you, Mr. Senator.

Senator **Leahy**. Thank you very much, Mr. Adams.

[The following was received for the record:]

PREPARED STATEMENT OF W. MELVIN ADAMS

Mr. Chairman and Members of the Committee:

My name is W. Melvin Adams. I am Executive Director of Americans United for Separation of Church and State. Americans United is a 35 year-old organization dedicated solely to the preservation of the religious liberty and church-state separation provisions of the First Amendment to the Constitution.

We represent through our membership individuals of conservative and liberal political persuasions as well as the full spectrum of religious faiths and those who are not connected with religion in any way. But all are concerned with the preservation of religious (freedom.) liberty.

Many of our members, who are of various religious faiths, have strong convictions about prayer. But all are alarmed at the prospect of government involvement in this strictly religious issue.

It is this unique ability to appeal to people of such diverse political and religious backgrounds and beliefs which especially qualifies this organization to testify on such a controversial issue as this proposed amendment.

The diversity in Americans United's own membership symbolizes the diversity of religious beliefs in this country, which is one of this nation's greatest strengths. We are very concerned because we believe that religious liberty and true freedom of religious expression would be greatly weakened by this amendment. There are a number of reasons for our concern.

CONSTITUTIONAL AMENDMENT - JUST ONE DAY OF HEARINGS

We are concerned with the manner in which these hearings have been conducted. As opponents of this amendment over the past several weeks, we have literally been forced to fight with this Committee for hearings, only then to receive one day.

Any genuine consideration of a constitutional amendment should involve numerous days of public discussion permitting all organizations to testify as well as members of Congress and constitutional scholars. The single day for a hearing has forced us into a limited witness list because of scheduling difficulties. And it does not allow for a thorough reflection and discussion of all aspects and ramifications of this amendment.

SILENT PRAYER

This amendment is drafted in vague and misleading language. Many adults do not understand or practice "silent prayer" let alone children. Prayer for one child may involve bowing his head. Others, however, may kneel, make the sign of the cross or even face the East toward Mecca.

Furthermore, if teachers are to fulfill their role in the classroom, it may be necessary to explain silent prayer to students. Difficulties could arise if they do not feel comfortable in that role.

Is the government going to issue through the Department of Education guidelines for teaching "silent prayer" in the public schools?

We are also concerned with the word "meditation" used in Section 1. One dictionary definition describes the word meditation as "a devotional exercise of contemplation."

Meditation has the same intent as prayer. It has religious connotations that can be construed to include religious practices, such as Transcendental Meditation (TM), an offshoot of Hinduism. Americans United won a suit in New Jersey in 1977 against the use of TM in public schools. The courts held that TM is a religion and therefore could not be incorporated into public school curricula.

There are other variants of this kind of religion that could easily be slipped into public school curricula under the guise of "meditation."

GOVERNMENT SPONSORED RELIGION PROVOKES STRIFE

It is easy to provoke religious strife in our public schools. The following are three examples from the past year.

In Little Axe, Oklahoma, the state's so-called Voluntary Prayer Law resulted in weekly prayer meetings and "sharing sessions" on public school grounds, with faculty and outside religious group involvement. When two Christian parents objected that the school was usurping their rights in religious education, they were harassed by the community. Both have been forced to leave their homes and move to another town. One of the parents, Mrs. Joanne Bell, was beaten by a school employee. Later, her home was burned to the ground in an act of arson.

In Bristol, Virginia a Methodist couple objected to the biased religious content of a so-called "voluntary" Bible class for fourth and fifth grade students in their public school. The couple's children were subjected to repeated acts of hostility and browbeating from their classmates and teachers. They have now filed suit in a Federal Court to halt this practice. The family has suffered harrassment, threats and ostracism as a result. A mean-spirited and vindictive campaign has been mounted to keep the religion classes, dividing the community.

A similar situation occurred in Reidsville, North Carolina when an Episcopalian lawyer and Sunday School teacher discovered that his faith was being slandered by a public school Bible teacher in another "voluntary" class situation. His daughter was upset by the teacher's assertion that her religion was against the Bible. This gentleman convinced the local school board to halt the class. But his victory has also resulted in ostracism and hatred.

COURTS HAVE POINTED OUT THE DANGERS

Since Engel v. Vitale, 370 U.S. 421 (1962) and Abington School District v. Schempp 374 U.S. 203 (1963), there has been an ongoing struggle between those who wish to require religious teachings and prayer in the public schools and those who contend that the Establishment Clause requires neutrality toward religion in public schools. After years of blatant attempts to reinstitute religious exercises in the public school classrooms, more sophisticated language is being used to reintroduce prayer and religious teachings on the premises of these public schools.

Instead of requiring students to recite a prayer written by state authorities, we now see legislative attempts to require periods of meditation and silence with little protection against each individual teacher's using this time to inculcate the teacher's own concept of meditation.

Senator Hatch's new version of S.J. Res. 73, the school prayer amendment, is one of those attempts to place religious exercises in public school classrooms without directly calling for the recitation of prayers.

A number of court decisions have noted the inherent problems with the silent prayer concept.

A Tennessee silent prayer statute was struck down in Beck v. McElrath, 548 F. Supp. 1161 (M.D. Tenn. 1982). In that case the United States District Court for the Middle District of Tennessee held that a Tennessee statute violated the Establishment Clause. The statute required a one minute period of silence for meditation, prayer or personal beliefs at the time of the first class each day in all grades and in all public schools violated the Establishment Clause.

The court gave weight to the legislative history giving rise to the enactment of the statute, noting that the overwhelming intent among legislators supporting the bill, including the sponsors, was to establish prayer as a daily fixture in the public school rooms of Tennessee. Id. at 1163.

The court further said that "as a practical matter, the statute's effect may well differ from one classroom to another in the absence of implementing guidelines. For example, some teachers may simply call for a moment of silence; some may call for a moment of silence and instruct students that they are to meditate, pray, or reflect on personal beliefs; and some, in straightforward execution of the legislative intent, might instruct students that a time is being provided for them to pray. Id. at 1165.

The United States District Court for the District of New Mexico on February 10, 1983, in Duffy v. Las Cruces Public Schools, 557 F.Supp. 1013 (D. N.M. 1983), held that a statute authorizing local school boards to implement a daily moment of silence in public schools was unconstitutional because the legislature had no clearly secular purpose in adopting the law, the primary effect of the statute was advancement of religion, and the statute caused excessive entanglement between church and state.

In deciding this case, the district court held that the court had the right to consider factors in addition to the statutory language in determining the legislative purpose. Such factors included the historical context of the statute, events leading up to passage of the act, and the contemporaneous statments of the legislative sponsors. Id. at 1019

The court rejected the defendants' argument that their purpose was merely to accommodate the exercise of children's rights to freedom of religion stating, "Here, the moment of silence goes far beyond a mere accommodation of the public's right to worship as it pleases. It establishes a devotional supervision. Far from being an accomodation of religion, it is an establishment of religion with the added element of being compulsory." Id. at 1020.

In holding that the statute violated the excessive entanglement prong of the Establishment Clause, the court stated:

> The moment of silence is intended to provide a time, place and atmosphere for prayer. The time chosen is during school hours, and the place is the school grounds. The atmosphere of silence is instilled and maintained by the teachers. These facts alone have been found sufficient to constitute excessive entanglement (citations omitted). Here, there is an even greater entanglement. The superintendent is obligated to enforce the policies of the board, including the moment of silence. He is responsible for insuring that District teachers observe the moment of silence. The Board is ultimately responsible for enforcement of the moment of silence policy.

Id. at 1021.

We believe that it is the intent of proponents of this and other school prayer legislation that school boards, teachers and administrators use this legislation to promote some kind of religious activity in public schools and to eventually promote government sponsored and supervised prayer and other religious activities in public schools.

It was acknowledged by Senator Thurmond during a recent mark-up of both S.J. Res. 73 and the Hatch version, that there are not enough votes to report S.J. Res. 73 otu of the Senate Judiciary

Committee. Senator Hatch's version is a political attempt to find some compromise amendment that more members could accept.

FALSE CONCLUSIONS

Many of the backers of this amendment believe and are spreading the word that terrible things have happened to this country because "God was kicked out of the public schools."

We are being told that because school prayer was struck down by the Supreme Court, the following evils have resulted.

The Vietnam War was a result
The race riots of the 60's were a result
The assassination of President John F. Kennedy
  and Martin Luther King were a direct result
The increased divorce rate is a result
The increased number of abortions is a result
The increased rate of crime is a result
The increase use of drugs is a result
And the increase of pre-marital sex is a result

If a school prayer law or amendment were passed wars would still continue as well as divorce, aboritons, drugs and crime.

What next? I'll tell you what is next. It was spelled out to me very forcefully last fall while attending a church-state meeting on the West coast.

A panel was discussing prayer in the public schools. One of the members of the panel was an attorney very active among the groups promoting school prayer.

I suggested to this man that he teach his children to have silent prayer at their desk before the bell rings and before the teacher brings the class to order.

His answer was quick, clear and straightforward. After admitting that such was possible, he indicated it was not enough because, "We want the government to recognize religion and also because this is just the first step."

The Hatch amendment is a compromise, an attempt to give something to these people. But let's not fool ourselves. School prayer is not a magical solution to crime, drugs or divorce.

Silent school prayer is just the first step. As the Supreme Court wisely noted in Abington v. Schempp, "The breach of neutrality that is today a trickling stream may all too soon become a raging torrent."

EQUAL ACCESS

Americans United also opposes the "equal access" section in the Hatch amendment. The wording is vague. It is fraught with problems.

While this organization supports the concept of "equal access," we strongly oppose this amendment because it is so vaguely worded. It could allow abuses.

For example, nowhere does it address the problem of where a school should announce these religious meetings. We would oppose the use of a public address system, teachers, bulletin boards, school newspapers or other means of communication for this purpose. There should be no announcement, support or encouragement by the school for religious activities before or after school.

It also does not discuss the practice, which Americans United would oppose, of allowing clergy or outside religious organizations to use the school as a platform for church activites and evangelism. Teachers, public school administrators and other paid school employees could under this amendment become very active in promoting religion.

Furthermore, the amendment does not discuss at what grade level equal access would be initiated. Americans United would oppose it on the elementary level because the students in these grades would not have the maturity to initiate those kinds of activities without some kind of adult supervision, sponsorship and participation.

It is also unclear what is meant by the words "equal access to the use of public school facilities for all voluntary student groups." This concept would force public schools to permit gay groups, Communist groups, so-called cults, Satan worshippers and other groups to meet in addition to well-established religious organizations.

We are not dealing with an amendment to a stuate but a basic change in our charter of individual rights.

Court principles must be broadly stated.

The Supreme Court is charged with the duty of protecting our basic rights. The proposed Hatch amendment seeks to adress a problem before it has been dealt with by the Court.

The Supreme Court has never ruled that truly voluntary individual prayer or group silent prayer or meditation in public schools violates the First Amendment.

The Court has also never construed that the First Amendment prohibits access of voluntary religious groups from public school facilities.

It is imperative to allow the Court to address these issues before taking the drastic step of this constitutional amendment.

Many other problems with the equal access provision should give this Committee reason to oppose the amendment. To put something that vague into an amendment is to invite untold constitutional dangers and problems.

Beyond that, we see major conflicts in the amendment because it contains two very different concepts. Silent prayer is not the same issue as equal access and should not be combined in the same amendment.

There is currently a bill, S.815, which could be amended to reflect these and other concerns that have been expressed. While the Hatch amendment could not be altered to reflect such specific concerns, S.815 could. Consequently, we suggest the Committee conduct hearings on S.815 and a thorough public discussion of the equal access concept in the form of a "bill."

WHY A CONSTITUTIONAL AMENDMENT

While the above concerns are major flaws in this proposal, the fact that it is in the form of a constitutional amendment is reason enough for senators to oppose it. It is unnecessary to amend the Constitution to allow for silent prayer. Students may already pray silently. The Supreme Court has never prohibited this kind of activity. The High Court merely prohibited compulsory, government sponsored and supervised prayer in schools.

This is a profoundly radical alteration of a basic concept and tradition in American law and history -- separation of church and state and government neutrality toward religion. This amendment would undo a revolutionary concept in the history of world governments that is our proudest contribution to civilization.

Religion can be a divisive issue when used for gains in the political realm. Government has no expertise in religion. It should remain neutral toward all religious experience.

This amendment brings us a step closer toward government sponsored religious activities in public schools. Speaking of the original Supreme Court school prayer decision, President John F. Kennedy said 20 years ago, the practice of prayer and religious devotions is best suited to the home, church or synagogue. The challenge of education is to teach and to prepare our children to take their places as productive members in a democratic society.

One of the priviledges of parents is to educate their children in the religious philosophy they choose.

I learned to pray at my mothers knee. In my home, we had morning and evening worship. Father would read some portion from the scriptures or talk a few moments on a religious subject. Then we would all kneel down and my brother would pray first, I would be next, then my mother and last my father. Sometimes he would close his prayer by using the Lord's Pryaer and we would all join in at that time.

We prayed before each meal. We prayed before going to bed. We were never taught rote prayers, such as "now I lay me down to sleep." We were taught at a very early age to talk to God as we would a friend. We practice this in our home and my children were taught in the same way.

My grandfather was a minister. My father and his four brothers were ministers. My brother and I are both ministers. And my two sons are ministers. All are committed Christian ministers and all are opposed to government sponsored school prayer.

SCHOOL PRAYER -- NOW OR NEVER!

I'm very concerned about a film that was shown last week on Thursday in this building, entitled "School Prayer -- Now or Never!" The film charged that church-state separation is a concept "straight out of Moscow," foisted on the American people as an American idea. The film also implied that the lawsuits banning government sponsored school prayer were a plot by the Communist party to weaken America and the free enterprise system.

Senator Jesse Helms appears in the film and arranged for its showing here. At the event, he called it "another good job" by the Leadership Foundation. Foundation representatives announced that the film will be shown nationwide and will be promoted by Richard Viguerie.

I am shocked that such shameless McCarthyite "red-baiting" would take place in our nation's capitol. I am dismayed that these untruths will be spread across the United States. Thomas Jefferson said that the First Amendment erected a "wall of separation between church and state." Was he a Communist? James Madison, Father of the Constitution, advocated "the total separation of church and state." Was he influenced by Moscow?

As an ordained minister of the Gospel, I am appalled that the supporters of government-sponsored school prayer feel free to slander those of us who are defending the religious liberty provisions of the First Amendment.

Tactics used by some proponents of this Amendment raise serious questions about their intent. We believe that the intent is to create an hysterical atmosphere which can rightly be called a new McCarthyism.

Senator **Leahy**. Mr. Landau, from ACLU.

STATEMENT OF DAVID LANDAU

Mr. **Landau**. Thank you, Mr. Chairman.

My name is David Landau. I am legislative counsel to the American Civil Liberties Union. I convey the regrets of Norman Dorsan, the president of the ACLU, who had to return——

Senator **Leahy**. I understand he had to leave because of the change in the time.

Mr. **Landau**. That is correct.

Senator **Leahy**. I can well understand. Again, I express my apologies for that. I have no control over the chairman's schedule.

Mr. **Landau**. We understand.

We appreciate this opportunity to present our views on the issue of prayer in the public schools. Both of the proposed constitutional amendments would fundamentally alter the structure of the first amendment itself and its balance between the protection of free exercise of religion and the separation of church and state. In so doing, the amendments would radically transform the relationship between government and religion. No longer would the Government be neutral toward religion. Rather, it would become the sponsor of religion and the instrument of particular denominations and forms of religious activity.

We at the ACLU support the historic principle upon which our Nation was founded, that the free exercise of religion can flourish only if religion is completely free from government That is the bedrock principle of the first amendment, and that principle would be destroyed if either of the pending amendments were to be passed by the Congress and ratified by the States.

We have a rich religious heritage in this country that reflects a pluralistic society. It has developed and flourished under a constitutional system that recognizes that religion is a private matter and that the rights of all persons to exercise freely their religious beliefs are best protected when the Government is prohibited from engaging in, interfering with, or sponsoring religious activities.

The principle of separation of government from religion was not invented or recently developed by the Supreme Court. It was written into the first amendment by the framers of the Constitution. The Supreme Court has applied this principle to the wide variety of factual situations that have been presented to it. In this century, for example, the Court has held that the Government cannot interfere with religion by requiring compulsory attendance at public schools in contravention of religious beliefs.

Forty years ago, the Court held that the Government may not require public school students to salute the flag in contravention of their religious beliefs. Two decades ago, in the school prayer decisions, the Supreme Court merely continued the application of the principle that government can neither sponsor nor impede the free exercise of religion.

In reaching its decisions, the Supreme Court conducted an inquiry into whether the challenge practices tended to promote that type of interdependence between religion and state which the first amendment was designed to prevent.

In other words, the school prayer decisions were part of an evolutionary process of the American principle of the separation of church and state, as it is applied to contemporary life. With the influx of immigration and the enormous religious and cultural diversity of the 20th century America, the protection of religious freedom through the separation of church and state is now more important than it has ever been. When viewed in this historical context, it becomes clear to us that the results of the 1962 and 1963 decisions cannot be reversed without fundamentally upsetting the structure of religious freedom embodied in the first amendment.

Both of the proposed constitutional amendments, by permitting the Government to promote and sponsor formal religious activity, go far beyond reversing the result in the specific cases of 1962 and 1963. Ultimately, they amend the first amendment itself by turning the government into the instrument of powerful religious groups at the expense of religious minorities and those who profess no religion.

Senate Joint Resolutions 73, which is the amendment sponsored by Senator Thurmond at the request of President Reagan, would permit the States to sponsor formal, group, oral prayer periods. Senator Hatch's version would permit the same, although the prayers would be silent. But whether silent or oral, officially sponsored prayer periods are precisely what transforms the Government into an instrument of religion. The resulting loss of religious freedom would be incalculable, as would the perversion of the civic function of the public schools.

We have outlined in our prepared statement some of the problems that could arise within the classroom, the ostracization of the students, problems of teachers enforcing this amendment, and so forth.

In short, the confusion that would inevitably result from the practical administrative ramifications of public school prayer would compound the overwhelming damage that would be done to the principles of the first amendment.

Sponsors of the amendment have suggested that the consequences must be balanced against the harm caused to those denied the right to pray in school. Nothing in the first amendment prohibits a student, individually, from praying. On the other hand, the free exercise clause does not mean, nor has it ever meant, that students have a right to obtain sponsorship by the Government of group prayer in public schools. If it does, then any religious majority would be able to force the Government to sponsor its beliefs to the detriment of religious minorities. This view is completely at odds with the lessons of history, of a country founded by religious minorities fleeing majority persecution, and it is a severe distortion of the free exercise principle.

Finally, a brief comment on the equal access section of the Hatch amendment. Under current interpretations of the first amendment, religious groups may have access to public school facilities if Government policy is one that is neutral and nondiscriminatory in both its terms of implementation, so long as the activities are wholly unrelated to the school and do not take place during the school day, nor are supported in any way with public funds. If the forum is truly open to all members of the public, not only students, and the circumstances of the use do not suggest Government involvement or sponsorship, then the establishment clause may not be offended by such religious activity.

As the previous witness stated, the Hatch amendment goes far beyond these neutral principles which are embodied in the current first amendment and would permit Government sponsorship of religious groups and clubs in the public schools, something that we would strongly oppose.

In short, Mr. Chairman, we oppose both the Hatch and Thurmond versions of the amendment and urge this committee to reject both

Senator LEAHY. On the Thurmond resolution, would you be able to have, for example, a teacher with the school board determine that they would have prayers in class, whatever the class might be, say, the fifth grade. The teacher would be told, "We are going to have this prayer at such-and-such a time." What if the teacher did not agree with the prayer?

Mr. LANDAU. Well, I would assume they would be under sanction by the school board to conduct that part of the regular course of activity in the classroom. It would be up to the school board to mandate that. For example, the school board, under the Thurmond version, could mandate a particular denomination's prayer, and it could lead to the kind of conflict which you have suggested.

Senator LEAHY. So that the prayer that they may determine—for example, I am thinking of my own children now—may be entirely different from the prayers we say at home?

Mr. LANDAU. That is correct under the Thurmond amendment.

Senator LEAHY. I might say, sir, in connection with your comments earlier, that my own family is very much like yours—a prayer before meals, a prayer in the evening, Mass on Sundays, and so forth. I certainly bring my children up to respect everyone else's religion. I am not sure, however, that I want somebody else to determine what their prayer is going to be outside.

Let me go into one other question on this equal access because that is a troubling thing, and I certainly find a lot of misconstruing of it in letters that I get from my own constituents in Vermont.

In Vermont, a lot of the schools make their facilities available to just about anybody. If the local chamber of commerce, for example, wants to have a large meeting, and they need the school auditorium, the cafeteria, and so on, they are allowed to have it. They usually get a bill afterward for the amount of food eaten, the janitorial services, if they need any particular security, and so on. If any other group wants it—if the local Baptist Church wanted to have it for a meeting, fine; the local Catholic Church could; any other group like that. If the area Democrats—there are seven left in Vermont—or the area Republicans—no matter who it might be, any particular group like that, with any relationship to the community itself, can go there.

Now, are you saying that there is nothing in the Constitution today to prohibit a school from doing that?

Mr. LANDAU. That is correct, Mr Chairman.

One of the things that has been badly distorted in this whole debate is how public facilities—and in many small towns across the country, the public school is the one public auditorium that is available—can be made available to public groups.

They can be made available under the first amendment to everyone—religious groups and nonreligious groups—on a first come, first served, nondiscriminatory basis, where there is no appearance that the school is sponsoring, or government is sponsoring the religious activities.

To give you an analagous situation, the Pope came here and conducted a Mass on the Mall. That is a public area. The ACLU certainly did not object to it. In fact, when certain people tried to stop that, we filed a brief saying that the Pope could conduct that Mass on the Mall, because that is a first come, first serve, nondiscriminatory public forum.

Senator LEAHY. Now, if the Archbishop of Canterbury wants to, he can, also?

Mr. LANDAU. That is right. Anybody in the United States, any religious group, if they go through the permit procedure, can hold services on the Mall. But what happens in the public school system is that many schools in this country do not have an open forum, that specific permission must be obtained from the school board or the principal of the school, and not everybody gets that permission. And that is where these close questions of law and fact arise in these cases, when we do not have open forum situation. The cases that have been brought to court, some by the ACLU, have involved much more than equal access. There may be an equal access policy on the books, but what happens is the school district uses that for formal prayer periods, conducting prayer, Bible-reading over loudspeaker systems, and a variety of other religious activities which are clearly prohibited by the first amendment. But as long as the school district and the school officials remain neutral in the whole process, and the forum is an open one, where everybody in the community has access to it, there is nothing in the Constitution that prohibits a religious group from using those school facilities.

Senator LEAHY. So you see no need to amend our Consitution?

Mr. LANDAU. That is correct, and it really has a very detrimental effect, because these are highly factual questions, which really can only be determined in the course of a lawsuit if there is a problem.

There is a cause of action today. If a religious group is denied access in neutral circumstances, the civil rights statutes cover that under religious discrimination. For example, the case involving universities, where a religious club was denied access to university facilities, and was the only kind of club denied it, the case went all the way to the Supreme Court and access was obtained. That case was brought under the civil rights statutes for religious discrimination.

Senator LEAHY. Do you two gentlemen feel the same way on that?

Mr. BUCHANAN. Yes.

Mr. ADAMS. Yes, we feel that equal access is something that is needed, but we are very much concerned about the amendment, which seems to just open the door wide open with no controls—no controls for the school, no controls for outside groups that would come in and try to dominate those groups, or anything like that. For student groups that should meet absolutely voluntarily, on their own, with maybe a teacher merely supervising conduct, but not injecting himself into the content of it in any way, we do not see that that is any violation of the first amendment.

Mr. BUCHANAN. Mr. Chairman, I would completely agree with what my colleagues here have said and also reiterate that we fear any dilution of or change of the first amendment itself. It has served us well. A good deal has been made in this hearing of the fact that some 80 percent of the American people desire prayer in schools, and according to some polls, would support a prayer amendment. I would respectfully point out that when it comes to protection of the Bill of Rights, there is something else involved. If 95 percent of the American people should vote to cut off the heads of the Judiciary Committee or of the entire Congress, then it is not inconceivable--[Laughter].

Mr. BUCHANAN [continuing]. It would still be incumbent upon us to make sure that our basic law continued to protect your right. And when it comes to the inalienable rights of man that our Founding Fathers were trying to secure here, and that it was the function of Government to protect and secure, then it seems to me it is not really just a matter of how many votes you can get for something. It is whether you are tampering with precious rights of American citizens. And this is what we most feel, that there be nothing to dilute or to change the protections of the first amendment and that precious right of all Americans that is involved, and we fear that, however well-intended, this kind of change could tamper with that which has served our basic rights and the rights of every individual citizen quite well for more than 200 years.

Senator LEAHY. Thank you. Thank you all very much. We will now go to the next panel, which includes the United Methodist Church, the Episcopal Church, and the Union of American Hebrew Congregations.

Is Mr. Ogle here?

Ms. STANFORD. Mr. Ogle had to go on and asked that I submit his testimony for the record.

Senator LEAHY. And, ma'am, you are——

Ms. STANFORD. I am Sherry Stanford, Legislative Associate for the Episcopal Church

Senator LEAHY. And, sir, you are——

Rabbi KAHN. I am Rabbi Bruce Kahn, from the Union of American Hebrew Congregations.

Senator LEAHY. All right. I will put Mr. Ogle's statement in the record.

[The following was received for the record:]

PREPARED STATEMENT OF GEORGE OGLE, UNITED METHODIST CHURCH

SCHOOL PRAYER

I. Introduction

Mr. Chairman my name is George Ogle. I am Program Director for the Department of Social and Economic Justice of the Board of Church and Society, the United Methodist Church.

First let me commend the chairman and other senators who over the last several years have struggled and agonized over the matter of prayer in our public schools. The very energy that you and many of us have expended on the question is witness both to its complexity and importance. Though we may not concur with the particular effort at hand, we do want to say that we recognize the sincerity with which this effort is being made.

II. General Position of the United Methodist Church

The Social Principles of the United Methodist Church says

> The state should not use its authority to inculcate particular religious beliefs..nor should it require prayer or worship in the public schools, but should leave students free to practice their own religious convictions.

This position is expanded in the 1980 General Conference statement on Church/Government Relations. The statement observes that "public schools have often been an important unifying force in modern pluralistic society by providing a setting for contact at an early age between children of vastly different backgrounds." It calls on public schools to take seriously the religious integrity of each child entrusted to their care and to not "establish any preferred form of religious observance or study." The statement specifically supports the decisions of the Supreme Court in regard to school prayer and expresses the belief that these decisions enhance and strengthen religious liberty within the pluralism that characterizes the U.S.A.

III. Considerations on the "Hatch Amendment"

A. The amendment under consideration says:

> "Nothing in this Constitution shall be construed to prohibit individual or group silent prayer or reflection in public schools. Neither the United States nor any state shall require any person to participate in such prayer or reflection. Nor shall they encourage any particular form of prayer or reflection."
>
> "Nothing in this Constitution shall be construed to prohibit equal access to the use of public school facilities by all voluntary student groups."

B. The proposed amendment has three references that require attention. It speaks of individual silent prayer, group silent prayer and equal access to public school facilities.

1. It is our understanding that individual persons now have the right to silent prayer as long as it is not prescribed or sponsored by the state or school administration.

2. Group silent prayer poses a problem since it is difficult to conceive of a group gathering for silent prayer unless it is sponsored or prescribed by someone. In public schools, during school time group silent prayer can hardly be seen as anything but school sponsored, and thus not acceptable.

3. The matter of equal access to school facilities poses a different question. On the face of it, there appears to be no reason why a religious group of students should not have access to school facilities on the same basis as non-religious groups. There should be equality of access, but even so neither the state nor the school administration can act as sponsors.

C. The above considerations lead us to the conclusion that an amendent to the constitution is not the appropriate method for handling these issues. The proposed amendment written in its negative syntax provides no guidelines for addressing the issues mentioned above, and would probably confuse the issues even further.

Therefore we suggest that the proposed constitutional amendment be withdrawn.

IV. Summary

Ours is a democratic society built on various pluralisms. One of these is religious pluralism. In our society we all commit ourselves to protect and respect the right of all others to believe and practice as God gives us light. Religious liberty is not a matter of majority rule, nor of majority vote. It is a covenant among us all as citizens of mutual religious respect. Therefore in a democratic and pluralistic society such as ours citizens should not be asked to vote for an amendment that would in effect show official preference to one form of religious expression.

The first amendment guarantees of religious liberty are clear, and in particular issues of prescribing prayer for use in schools, we believe the Supreme Court's decisions of 1962 and 1982 protect the religious liberty of all our citizens. Therefore any further amendment is unnecessary.

Senator LEAHY. I will ask, Ms. Stanford, if you will begin. I will leave partway through your testimony. I would hope, though, that both of you and the panel will stay and continue your testimony.

Mr. Scotch, of my office, Ben Scotch, and Dick Bowman from Senator Thurmond's office, will be here and take the testimony. I wish one of us could be here while you are doing it. I would emphasize, however, that it is important that the testimony be put in, so that we have balanced testimony for this hearing. I feel somewhat uncomfortable suggesting my own preferences on the constitutional amendment, because usually, we have several Senators here, and when one of them suggests theirs, there is always somebody who has a different feeling, and you can make sure it gets balanced. And I would hasten to add that what I am going to say, there are other Senators who feel just the opposite. I happen to take an attitude that we should be very, very careful about ever amending the Constitution, and that we should do it only in extreme cases and only with great consensus of opinion in our country. I think one of the reasons the United States has existed so long as a democracy is that we have a very short, very carefully drafted Constitution, and that we also have a difficult procedure in amending it, unlike some other countries which have a constitution stretching from here to that wall and is constantly undergoing changes. I should hasten to add that there are others who feel we should do it more frequently.

In any event, I think that this question of school prayer is an important enough one that we should have it here, and indeed, the

Senate and the House should vote on whether we have a constitutional amendment in this regard or not. I think there is enough interest in it. But when we do that, I would like to make sure that when we vote on it and it goes on the floor of the Senate, that we have had a full hearing record with both sides having been heard.

For those like myself who prefer to think that prayer is something, as far as children are concerned, that they ought to deal with their parents in their own religious background, whether it is Jewish, Christian, whatever, that they do it that way, we certainly should have our feelings heard. Those who feel that the Government should step into this field and have some determination of whether children say prayers or how they say prayers, well, then, they should also have a chance to be heard.

My own feeling, as I said before, is that that is something that should be between a child and his parents and their own religious leaders. The Government gets its nose into too many other things. I may well be the minority on that, one, too.

But we will start with you, ma'am.

STATEMENT OF A PANEL, INCLUDING SHERRY STANFORD, LEGISLATIVE ASSOCIATE, WASHINGTON OFFICE, EPISCOPAL CHURCH; AND RABBI BRUCE KAHN, ON BEHALF OF UNION OF AMERICAN HEBREW CONGREGATIONS

Ms. STANFORD. My name is Sherry Stanford, legislative associate, Washington office of the Episcopal Church. I am here today to respond to the proposed Hatch amendment and to reiterate the position of the Episcopal Church regarding prayer and religious exercises in public schools.

In November 1981, the executive council of the Episcopal Church adopted the following resolution in response to legislation being proposed in the 97th Congress:

> Whereas, there are proposals pending in the Congress of the United States to facilitate the establishing by governments of prayer in the public schools; and
>
> Whereas, it is not and should not be the business of government to establish when people shall pray or the prayers which they shall use; and
>
> Whereas, it is always open to any person to pray at any time whether in the public schools, at work or at play; therefore, be it
>
> Resolved that this Executive Council encourages the use of prayer in connection with all aspects of daily life, while at the same time strongly opposing all attempts by the state to establish when or how people shall pray and thus opposing all government legislation which would prescribe means or methods of prayer in public schools or which is designed to encourage local authorities to prescribe such means or methods of prayer in public schools; and be it further
>
> Resolved that a copy of this resolution be sent to every member of Congress.

The Hatch amendment is unacceptable, based upon the reasons set forth in the aforementioned resolution.

I believe I am going to stop here, in the interest of saving some time, and not comment on the amendment, because the points that I would make have already been made today.

Mr. SCOTCH. Your entire statement will, of course, be included in the record.

Ms. STANFORD. Yes, I understand that. Thank you. I appreciate the opportunity for being able to be here.

Mr. SCOTCH. We appreciate your being here.

[The unread portion of Ms. Stanford's prepared statement follows:]

PREPARED STATEMENT OF SHERRY STANFORD

Nothing in this Constitution shall be construed to prohibit individual or group silent prayer or mediation in public schools . . .

There is nothing prohibiting an individual from praying silently in public schools. Group silent prayer, however, would require a leader to suggest that the group pray or meditate, and in all likelihood, it would be a governmental official, a teacher, acting upon policy formulated by the state or local school district that there be time set aside for silent prayer or meditation.

Neither the United States nor any state shall require any person to participate in such prayer or reflection . . .

While student participation would not be required, non-participating students would be forced either to leave the classroom or to sit with the group while not participating. Such would be an embarrassing situation for the nonparticipant. In either case, the formalization of silent prayer by a governmental entity would engender some measure of coercion of the student to participate in the organized religious activity.

Nor shall they encourage any particular form of meditation or prayer . . .

A state or local governmental entity would determine that a time for silent prayer or meditation be provided during the day. The amendment would encourage some local authorities to set aside a time of prayer or meditation and it is not the business of government to establish when people shall pray.

Thank you for the opportunity to present the position of the Episcopal Church.

Mr. SCOTCH. Rabbi Kahn.

STATEMENT OF RABBI BRUCE KAHN

Rabbi KAHN. I am Rabbi Bruce Kahn, and I am honored to be here today on behalf of the Union of American Hebrew Congregations, comprised of 750 member synagogues and 1.2 million Jewish congregants, served by the 1,200 members of the Central Conference of American Rabbis.

I will give a very brief version of the document that has already been submitted, also to save time and not to be too terribly repetitious.

Jewish history teaches us to be especially cognizant of issues pertaining to religion and the state, which has a lot to do with why I am here today. While it is our purpose to address primarily the issue of silent prayer and meditation, it is necessary to say a few words about the equal access provision.

The wording of this provision is, on the surface, neutral, yet, we believe that insofar as the possibility exists to permit voluntary religious clubs to form and meet in public school facilities under the sponsorship of the school, this violates the fundamental values of the Constitution and sets a precedent which can lead to radical changes in the constitutional separation of church and state. The result of this amendment would be that public school classrooms will be turned over during the week to student religious groups for religious instruction and practice. Either the groups will meet with or without any supervision, or under the supervision of outsiders—both of which would be an abrogation of the responsibility of the school authorities—or they will meet under the supervision of teachers or other school personnel, which is clearly an example of state-run religion.

Our understanding is that the public schools were intended to be places where all students would have the opportunity to participate equally in all activity. The presence of sectarian religious clubs violates this concept. In addition, their formation could well open the door for religious proselytization in the schools. The clubs will inevitably further self-segregation of students along religious lines, divisiveness among the student and teacher bodies, and will raise the specter of the entanglement of the school authorities in sponsoring or running religious activities, thereby undermining the foundation of religious freedom through church-state separation, currently preserved by the Constitution.

With your permission, I would like now to turn to the issue of silent prayer and meditation being established in the schools. To the extent that the proposed amendments change the Constitution, they raise serious problems for Jews. If the intent of the provision is to allow children to pray or meditate silently at their own initiative, as has been stated many times, that is already permitted by the Constitution, as well as being encouraged by Jewish tradition. No drastic measure such as changing the Constitution is necessary for this to occur.

Currently, the urging to pray or meditate emanates from a child's religious conviction and religious authorities, including the youngster's parents. That is natural and right. The urging does not emanate from secular public school authorities. That would be, in our land, unnatural and wrong. Further, the 1-minute silent format will, for many students, bring confusion to their worship habits and perhaps trivialize the experience for them. This amendment may well weaken the sanctity of prayer in the minds of the young. It was in the past, and remains so in the present, difficult enough to get everyone to behave when reciting the Pledge of Allegiance. Now we try to institute in public school a minute of meaningful silence, just when the kids have arrived and are anxious to talk with their friends, and not yet settled down to do what they are there to do: learn. And the teacher says, "Okay, boys and girls, you must be quiet now so we can have a minute of meaningful silent prayer or meditation." The request goes unheeded, and then the teacher gets stern: "Children, quiet down and pray." The normal atmosphere in the early morning classroom will likely wipe out quickly the voluntary nature of this activity. And who is there to check for abuses?

Finally, it is said that public opinion seems to favor a constitutional amendment allowing prayer and voluntary religious activity on the school premises. No doubt each of you, each of the Senators, have received a lot of mail in favor of rewriting the Constitution. But I am sure the Senators would agree that if the foundation of the Constitution were always to bow to whatever popular passion stirs voters in any particular year, the entire Bill of Rights would already be a relic of history. We know that there is good reason for such concern regarding this amendment. Such an amendment could not be enacted without violating the spirit of the Constitution. There could well be attempts to stretch the limits of the law, and there could arise prejudicial interpretations on the part of individual teachers, students, and administrators.

The amendment will not only give rise to a plethora of court values on its interpretations, but it also sets up an umbrella to shield countless, inevitable abuses that will go unreported. And many of us in the Jewish community are particularly sensitive to the ability of public institutions to give sanction to prejudicial treatment of the law. And in many local communities, it may be unbearably threatening for a lone Jewish family to protest the unfair application of the law.

The only proper response to potential infringements of religious freedom is to check them as they begin their encroachment on the borders of the Constitution. There is great precedent for this in Jewish law, and it is called Siyag latorah [phonetic], to put a fecse around our most precious values, and that is, to reject, to fence out, seemingly innocuous changes that could well lead to serious transgressions. Prayer is wonderful. Public school sponsorship of prayer and religious clubs—that is the transgression.

Senate Joint Resolution "blank" and S. 815 are but first steps to Senate Joint Resolution 73. These would establish a precedent for more and stronger bills and resolutions to follow, until we return to and go beyond the way it was in the fifties and before, when the constitutional rights of so many youngsters were so regularly violated in public schools. Please put a fence of protection around the constitutional guarantees afforded the children of our land; the right of religious freedom through the separation of church and state. Let us not compromise that free, unfettered exercise of religious liberty. Let us retain the integrity of this value. Our profound respect for the Congress and its desire to serve the common good leads us to say to the members of the Senate Judiciary Committee, we look to you to promote a free and just society in our schools and not to promote the formal organization of religion in public schools. Many Jews would see a rejection of Senate Joint Resolution "blank," Senate Joint Resolution 815, and Senate Joint Resolution 73 as a sure safeguard for the preservation of our religious heritage, and the religious heritage of not many Americans, but of each American.

Thank you very much.

[The following was received for the record.]

PREPARED STATEMENT OF RABBI BRUCE KAHN

I am Rabbi Bruce Kahn. I am here today on behalf of the Union of American Hebrew Congregations whose 750 congregations nationwide represent 1.2 million Jews and the Central Conference of American Rabbis representing over 1200 Reform Rabbis throughout the United States.

As Jews, we are particularly concerned with issues of religious liberty. Our holiday of Chanukah is a testimony to humankind's sacred right to worship God each in our own way. Throughout history, Jews have characteristically been victims of religious tyranny. I do not suggest that the Jewish Bible or Jewish theology enjoins us to separation of church and state. Rather, I believe that the totality of Jewish history is a devastatingly powerful argument for church/state separation. No matter what the land or the era, when any religious group was able to control the state, Jews were not free.

As clergy and religiously concerned people the CCAR and UAHC are deeply committed to a vision of a society that is guarded by religious values and that is imbued with a transcended sense of Godliness permeating every human activity. It is a vision described in our liturgy "of a world perfected under the Kingdom of God." That is our daily prayer, and in our various enterprises, as Americans and as Jews, we strive and hope to make that vision more of a reality.

We are thus spiritually attuned to what is surely the very antithesis of secularism. Our goal is the "holy" society. But, as I will indicate presently there is a crucial difference between society and state. In our plural society, the state must be truly neutral if society is to achieve holiness.

Like all American citizens, we cannot view with equanimity any effort whose effect - whether intended or not - may be to diminish our Bill of Rights in any way. As religionists, we have an additional and very special stake, because this Bill of Rights, and particularly the First Amendment, have, since the founding of our Republic, assured a climate which has made for unparallelled growth of religious activity and liberty in this country. We would therefore oppose any effort to tamper with this precious heritage. I come here today to give voice to a deep conviction that the Constitutional Amendment which is before you, however well-intentioned the motivations of its sponsors and however noble the objectives contemplated, represents a dangerous experiment upon American liberties. If adopted, it will begin an irreversible process which will result in an unraveling of the historic fabric of the Bill of Rights. It would, I suggest, earn for this Congress the approbrium of history as the group of lawmakers who presided over the liquidation of a fundamental American principle which sheltered the religious liberty of the people for over two hundred years.

Many of the points which we wish to make have been forcefully argued before this Committee by people of varying perspectives: fundamentalists who object to the vapid meaninglessness of a few minutes of silent meditation; civil libertarians who see peril to the integrity of the Constitution; and members of various mainstream religious groups who fear eventual infringement on their religious liberty through state intrusion into the exercise of religious freedom.

Let me, however, emphasize a few points. While it is our purpose to address primarily the issue of silent meditation, it is necessary to say a few words about the so-called "equal access" provision. While the wording of this provision is, on the surface, "neutral," we believe that insofar as the intent is to permit voluntary religious groups to meet on public school facilities, it violates the fundamental values of the Constitution and sets a precedent which can lead to radical changes in the Constitutional separation of church and state. The result of this amendment would be that public school classrooms will be turned over to religious groups for religious purposes. These groups would meet on school days when school attendance is required by law. Either the groups will meet without any supervision or under supervision of outsiders, both of which would be an abrogation of the responsibility of the school authorities; or, they will meet under the supervision of teachers or other school personnel which is clearly state establishment of religion.

The public schools were intended to be places where all students would have the opportunity to participate equally in all activities. The presence of sectarian religious clubs opens the door for religious proselytization in the schools. They will inevitably lead to the self-segregation of students along religious lines, divisiveness among the student and teacher bodies, and will raise the specter of the entanglement of the school authorities in sponsoring or running religious activities thereby undermining the foundation of religious freedom currently preserved by the Constitution.

The provision providing for individual or group silent prayer raises equally perilous concerns. While the provision provides that the state shall not require or encourage any particular form of prayer, the concept of organized religious activity in schools (whether silent or not) which is totally free of the influence of the state, is, I submit, a delusion. While technically prayer cannot be required, this amendment would allow teachers to organize, and indirectly encourage prayer activity, placing an unfair burden on students who for a variety of reasons may not wish to participate. It is more difficult for a child than an adult to be different from his or her peers. By requiring some students to place themselves in the embarrassing situation of either leaving the room or simply remaining silent while others pray, an inner conflict is set up between giving in to peer pressure to conform and being loyal to parents and ideals taught at home by challenging a pattern acceptable to teachers and classmates.

To the extent that this amendment changes the Constitution, it raises serious problems for religious Jews. If the intent of the provision is to allow children to pray silently at their own initiative, that is already permitted by the Constitution. Jewish tradition, not unlike most other religious traditions, knows of two kinds of prayer: private prayer and public prayer. There is hardly a place or activity that, in Jewish tradition, renders private prayer inappropriate. A Jew is bidden to recite private prayers before he or she eats or drinks, on the completion of meals, on beholding the beauty of God's nature, when putting on a new garment, upon hearing good tidings - in short, there is virtually no aspect of human experience that a Jew is not bidden to sanctify with prayer. There is, therefore, nothing inappropriate, from a Jewish religious point of view, and I might add, from a Constitutional point of view, in a student reciting such private prayers during the course of his school day, provided he does not obstruct or impede the normal school program.

Public prayer is an entirely different matter again. Our prayers, not unlike the public prayers of most other faiths, are formalized both as to content and matter of recitation. This is necessarily so, for prayer is the singular expression of a particular faith community shaped and formed by, and giving expression to, a unique historical encounter with the Divine. The Jewish prayer in the course of its 4,000 year history has evolved into a sophisticated ritual that demands of the worshipper a selection of carefully designed blessings and actions. To try to reduce this experience to a minute of silent prayer trivializes and secularizes Jewish worship. A minute is hardly sufficient for Jewish public prayer to take place nor for private prayer to be meaningful. Nor does the public school classroom provide either the tools or the setting which Jews consider central to their prayer experience. To ask Jews to simply sit by quietly while others pray in their fashion is not only demeaning, but also serves to obstruct the free exercise of religion.

Jews are expected to take worship seriously. When Jewish children pray, questions will arise which need to be answered. "What do I pray for?" "Which words should I use?" "What is the meaning of the prayer which my friend at the next desk tells me he uses each day?" To whom does the child address these questions? To the teacher? To the principal? To an outspokenly religious classmate from another religious faith? Or do we tell the child it is acceptable to pray in school but not to discuss such questions there?

This amendment would result in activities which undermine the meaning of prayer and the efficiency of ongoing school operations. Remember back to when you and I were school children. It was often difficult enough to get the students to engage in organized rituals such as the "Pledge of Allegiance" where they are at least engaged in common vocal activity. But a minute of meaningful silence? The children arrive at school excited to see their friends, absorbed in conversation. The teacher calls for quiet. A few students continue to talk. The teacher speaks again, harshly if necessary, "Now boys and girls, you must be quiet now so that we can have our meaningful moments of silent prayer. Now sit quietly and pray." This obligation will only make a teacher's job more difficult, by putting him or her in the awkward position of compelling students to engage in an activity which bears no clear relationship to their curriculum. There is no reason to think that students will be cooperative. Furthermore, there is no reason to think that teachers will be eager to implement the law. Their begrudging willingness to do so can set only a poor tone, either for prayer or for the start of a school day. Finally, potential disagreements engendered by such activities between students and teachers, students and students and, teachers and teachers, far from inducing a calm atmosphere for learning or prayer, will prove a further obstacle to the primary purpose of school.

Finally, it is said that public opinion seems to favor a "Constitutional Amendment allowing prayer and voluntary religious activity on the school premises." No doubt each of you has received much mail in favor of rewriting the Constitution. But, if I may say so, the responsibility of the legislator is the weighing of conscience and principle and not the weighing of mail alone. The prophet said, "Thou art the man." He did not say, Thou art the clerk to register in the Gallup Poll. If the foundation of the Constitution were to bow to the wind of whatever popular passion stirs each generation, the entire Bill of Rights would already be a relic of history. We know that there is good reason for such concern regarding this amendment. Such an amendment could not be enacted without numerous violations of the spirit of the Constitution. There will be attempts to stretch the limits of the law, and prejudicial interpretations on the part of individual teachers, students, and administrators. The amendment will not only give rise to a plethora of court battles on its interpretations, but also sets up an umbrella for countless inevitable abuses that will go unreported. We, in the Jewish community, are particularly sensitive to the ability of public institutions unwittingly to give sanction to prejudicial treatment of the law. In many local communities, it may be unbearably threatening for a lone Jewish family to protest the unfair application of the law.

Furthermore, the desire of some religious groups to foist their sectarian aims on the public will be exacerbated by the passage of this amendment. Giving in to pressure for prayer in public schools will not placate such a constituency. It will, rather, add fuel to their fire. The only proper response to infringements of religious freedom is to check them at their first encroachment on the borders of constitutional values, not at some further point when the issue takes on more "serious" implications.

Let none who support this measure delude themselves that they have rendered religion or liberty a service. In a plural society, it is not and should not be the business of government to aid religion, and if it does assume that role, then, in the very process and precedent it establishes, it does religion a harm and disservice that will far outweigh the intended benevolence. For it will have compromised that free and unfettered exercise of religious liberty without which religious faith cannot for long retain its integrity and independence. Our profound respect for the Congress and the desire of its members to serve the common good leads us to say to you, the members of the Senate Judiciary Committee; your business is not the promotion of religion, it is rather the preservation of a free and just society, for that, and nothing else, offers the surest safeguard for the preservation and strengthening of our religious heritage.

Mr. SCOTCH. Thank you both.

Mr. BOWMAN. Rabbi, can I ask you a question?

Rabbi KAHN. Yes, sir.

Mr. BOWMAN. Is it the position of the Union of American Hebrew Congregations that public school students can now pray aloud any time they want to?

Rabbi KAHN. It would depend on when, whether it was interfering with regular school activities or not.

Mr. BOWMAN Well——

Rabbi KAHN. If somebody was out on the playground, and they walked up to the fence, and they decided to say a prayer out loud, I cannot imagine that anybody in the Union or the CCAR would object to that. But if one was to stand up in the middle of math class and have the class stop so that he could carry out a religious service, I think we would find that objectionable.

Mr. BOWMAN. OK. That would not be possible during an organized class.

Rabbi KAHN. That is correct.

Mr. BOWMAN. OK. How about silent prayer? Could that go on any time during the day?

Rabbi KAHN. Well, if somebody is praying silently while somebody is lecturing, there is no control over that. If an individual decides to do that, you do not know whether they are paying attention to what the teacher is lecturing, or just meditating or praying to oneself. You cannot control that.

Mr. BOWMAN. Well, do you think that your concept here will work in a situation where student Richard Roe, for instance, is praying silently to himself in algebra class, and then the teacher calls on him for an answer, and of course, he has not been paying attention.

Rabbi KAHN. Yes. And——

Mr. BOWMAN. Can you give me an example of how that would work? It seems to me that in your statement, you are saying they can pray any time the spirit moves them to do so, provided only that the school program is not disrupted thereby. That seems to be a pretty broad perception.

Rabbi KAHN. Well, I do not think that anybody has in mind that we are trying to manage the individual thoughts at all points during the day of each youngster in the schools. I would think that no one would ever entertain such an idea.

If anybody seeks to pray—let me give you an example. Let us say at 1 o'clock in the afternoon in Spanish class, you know that your father is undergoing heart surgery at that time, and you stop paying attention, and you are praying that everything will go all right. I cannot imagine that anybody, no matter what side of the issue they happened to be on, would have any objection to that, not even the teacher of the class. If somebody is habitually not paying attention, and what they are doing so is detrimental to their grade and learning, then it might require some discussion with the parents about what is going on. If there is a problem, then it should be corrected.

But I fail to see what you are proposing, has to do with what is being suggested here.

Mr. **Bowman**. Well, wouldn't you agree that your proviso here pretty much narrowly limits the time in which somebody could voluntarily engage in silent prayer?

Rabbi **Kahn**. No, I would not. I do not think it enters into mind control at all. I think it simply says that prayer—silent or not—that is sponsored by the school is objectionable. That which an individual is moved to do is not being addressed at all.

Mr. **Bowman**. Thank you, sir.

Mr Scotch. Thank you.

Mr. **Scotch**. The next panel, panel VII, will bring us witnesses from the American Association of School Administrators—is Dr. Ira J. Singer here—the National Association of State Boards of Education—Joanne Goldsmith—and the National Education Association.

Why don't we start from left to right this time.

Dr. Singer.

STATEMENT OF A PANEL, INCLUDING IRA J. SINGER, ON BEHALF OF AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS; JOANNE GOLDSMITH, PRESIDENT, NATIONAL ASSOCIATION OF STATE BOARDS OF EDUCATION, AND NAT DERSHOWITZ, DIRECTOR, COMMISSION ON LAW AND SOCIAL ACTION, AMERICAN JEWISH CONGRESS

Dr. **Singer**. Thank you.

I am Dr. Ira J. Singer. I am superintendent of schools of the Herricks Public Schools in New Hyde Park, NY, and if that sounds familiar, it is because Herricks is the site of the landmark *Engel Vitale* decision in 1962. I am also here representing the American Association of School Administrators, a professional association of local school superintendents and other school administrators.

For the record, I appreciate, really appreciate, your willingness to be here, but resent terribly the fact that not one Senator is present to hear my testimony or that of other witnesses currently present.

To come directly to the point, AASA opposes both Senate Joint Resolution 73 and the alternative proposed by the Constitution Subcommittee of this committee for silent meditation and equal access to school facilities. More specifically, AASA opposes putting such matters in the Constitution where they become law for all citizens throughout the Nation.

The AASA does not favor Senate Joint Resolution 73 because we believe it to be contrary to the principles upon which this country was founded, principles found in the Constitution. In school, we teach the history of our Nation through the beliefs and views of our Founding Fathers, views which are not consonant with either the substance or the intent of Senate Joint Resolution 73. So often, prayer advocates invoke the name of Jefferson in their cause, but what kind of man was Jefferson, and what did he believe?

Thomas Jefferson was a staunch advocate of civil rights, and in the first amendment, fought for the protection of the rights of every man from religion, not for religion. He was terribly concerned about the Government recognizing a one and only righteous way to heaven. He abhorred such talk. He was "sworn against tyranny of the minds of man." That famous quote was uttered about the tyranny of religion, not patriotism, as is so often taught in our schools.

In Orlando last March, President Reagan stated, "When our Founding Fathers passed the first amendment, they sought to protect churches from Government interference." To the contrary, the first amendment was written to protect the individual citizen, not the church, from religious coercion of any form. This was Jefferson's theme.

In obtaining the Virginia bill for religious liberty, Jefferson and Madison opposed all religious establishment by law on grounds of principle. Jefferson attacked those who would force religious dogma on others, charging them with an "impious presumption to assume domain over the freedom of others depriving them of their liberty." He stated that "our civil rights have no dependence upon our religious beliefs," and that "no man shall be compelled to frequent or support any religious ministry whatsoever."

In fact, revisionist interpretations of the Constitution have gone so far as to lead one Federal district court judge to proclaim that, in the *Engel* v. *Vitale* case, the Supreme Court "erred in its reading of history," and that the constitutional wall of separation between church and state is a "myth." A State senator, in praising this judge's opinion, held that the framers of the Constitution "did not believe in the separation of church and state," and one nationally prominent clergyman has said that school prayer was "in the intent and mind of the first amendment framers." What would Jefferson say to that?

My testimony here is particularly fitting since I do come from the *Engel* v. *Vitale* site. The prayer in question was voluntary and nondenominational, to be recited as part of opening day exercises. It was composed by State officials and authorized and recommended by the State Board of Regents. The Supreme Court found it to be unconstitutional.

Justice Black, in writing his majority opinion, stated:

> Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary, served to free it from the limitations of the "establishment" clause.

Since 1962, the Court ruling on voluntary prayer has withstood the test of time, through a variety of assaults and circumventions. Black did not err in his reading of history, but testified for our Founding Fathers in restating basic Jeffersonian principles, and the children of Herricks have not suffered at all.

Aside from the Court's opinion, the practical implications of a constitutional amendment requiring voluntary prayer in the classroom are nightmarish. How is a child excused from class if that child does not wish to participate in this voluntary activity?

Conformity is a powerful force among children of all ages. In some places, a child would have to be truly heroic to ask to leave the room. And the teacher who does not believe in this practice must now police it. Will his or her attitude become more powerful than the compulsion to pray or be excused. How will teacher-parent relations be affected when they are in disagreement over the product and the process of the proposed amendment?

The prospects of disruption, litigation, noncompliance and ridicule are, to say the least, disquieting. And many of these same problems relate to the silent prayer amendment.

Resolution 73 also fails to recognize the contemporary reality of the American schoolhouse, where Christians, Jews, Muslims, Hindus, Taoists, and other children of disparate religions, as well as those who profess no religious affiliation, coexist in the same classroom. Collective or unison prayer, spoken or silent, voluntary or otherwise, would trample on the beliefs of many students and result in an atmosphere of stress and dissension

As for the formal adoption of a period of silent prayer, AASA is opposed to a constitutional mandate for such practice. The courts, for the most part, have found a period of prayer or meditation thus far to be in violation of the establishment clause of the first amendment. It is true that individual districts can be found where such practice is tolerated. However, in Alabama, New Mexico, and Tennessee, these laws were overturned. In Massachusetts, the legislature was told by its State supreme court that silent meditation would, at least in some instances, lead to oral recitation. In other words, during the moment of silence, individuals would pray aloud and make religious gestures. The teacher must either allow such actions or stop them—an untenable and inappropriate responsibility either way.

I am not so certain as others this morning that the Supreme Court would find a moment of silence constitutional. If a teacher requires a period of silence for reasons other than the high level of noise in the class, the children will ask why. The teacher must answer, to give children who wish to, a chance to pray. The effect would be obvious. Students would be praying in a public school because of a government directive—a clear violation of the first amendment. Students who wish to pray may do so now—at home, alone in school, in church, or the meadow—but not by Government invitation in a publicly tax-supported schoolhouse. An amendment to require silence so that children may pray is unnecessary and, I think, unconstitutional.

Finally, AASA opposes a constitutional amendment requiring public schools to grant equal access to school facilities to religious groups throughout the Nation. This is a comparatively new effort to merge church and school. If the courts reject the concept as constitutionally unacceptable, it would not be out of hostility, but rather, a concern over our heading down a new road of religious establishment.

Aside from the opinion of the Court, the AASA recognizes that various school districts throughout the country have, at their own risk, entered into contractual arrangements with religious groups for the temporary use of school facilities, usually for emergency purposes. A constitutional amendment would complicate such voluntary decisions and require all school boards, whether they wished to or not, to grant access to all groups in a way that would surely interfere with school activities. So-called student study groups would probably give way to more formal church-sponsored programs. Church-related activities following immediately upon student dismissal would be perceived as an integral part of the school's extra- and co-curricular programs. While attendance would be voluntary, it would be apparent to all students in the school that religious activity was authorized and, fairly judged or not, established by the board of education.

Schools could easily become magnets for all religious groups, including extremist cults, seeking a new home or additional space. Schools could become school-churches. Equipment, materials and supplies would be in jeopardy, and the smooth flow of instruction from day to day would be disrupted. Given the random nature of the groups who would demand access, security would have to be increased, screening would become a full-time job, and supervision, insurance and liability, major problems.

In effect, the attention, energy and time of students, teachers and school administrators could easily be diverted from their primary mission of public education, impeded by such distractions as multiple religious groups competing for the use of public schoolhouses.

In summary, the AASA feels that prayer is a very personal experience, and religion, an individual matter. Mixing education and religion in the public schools of our diverse society is not wise. Nor is it sound practice to employ the Constitution as a handy remedy to appease those who have been frustrated by court decisions. The Constitution, after all, is the foundation of our national wisdom. The balance of powers provide recourse through the courts to those who feel that their rights have been violated by legislative acts. The interplay of the judicial and legislative branches of government has protected the civil rights of Americans and sustained this Nation's integrity as a democratic society through more than a century of history. That process should be preserved, and the proposed constitutional amendments rejected.

Thank you.

[The following was received for the record:]

PREPARED STATEMENT OF IRA J. SINGER

Mr. Chairman. Committee Members. I am here today representing the American Association of School Administrators, the professional association of local school superintendents and other school administrators.

It is my honor and privilege to address Senators of the Congress of the United States and discuss the proposed constitutional amendments on school prayer.

To come directly to the point, AASA opposes both Joint Resolution 73 and the alternative proposed by the Constitution Subcommittee of this Committee for silent meditation and equal access to school facilities. More specifically AASA opposes putting such matters in the constitution where they become law for all citizens throughout the nation.

The AASA Committee on Federal Policy and Legislation opposes Senate JT Resolution 73 because we believe it to be contrary to the principles upon which this country was founded.

In school we teach the history of our nation through the beliefs and views of our Founding Fathers, views which were not consonant with the substance or intent of Resolution 73 or the subcommittee alternative.

For example, Thomas Jefferson was a staunch advocate of civil rights and, in the 1st Amendment, fought for the protection of the rights of everyman _from_ religion not _for_ religion. He was terribly concerned about the government recognizing a one and only righteous way to heaven. He abhorred such talk. He was " . . . sworn against tyranny of the minds of man." That famous quote was uttered about the tyranny of religion, _not_ patriotism, as it is so often taught in our schools. To zealous Calvinists who denounced him as an atheist, Jefferson charged that " . . . the effect of religous coercion would be to make one-half the world fools and the other half hypocrites."

In Orlando last March, President Reagan stated, "When our Founding Fathers passed the 1st Amendment they sought to protect churches from government interference . . . " To the contrary, the 1st Amendment, was written to protect the individual citizen, not the church, from religious coercion of any form. This was Jefferson's theme.

In commenting upon religious freedom in the Virginia Acts, Jefferson wrote that "diversity is the law of nature." He attacked those who would force religious dogma on others charging them with an " . . . impious presumption to assume domain over the freedom of others depriving them of their liberty." He stated that " . . . our civil rights have no dependence upon our religious beliefs . . ."; and that " . . . no man shall be compelled to frequent or support any religious ministry whatsoever." Jefferson was a highly moral man who held that the opinions of atheists should have equal value to those who professed religious beliefs. For these and other statements, he was denounced by the Colonist clergy in New England as an atheist. Jefferson's retort was that " . . . no mind beyond mediocrity bothered to improve itself in New England."

In fact, revisionist interpretations have gone so far as to lead one federal district judge to proclaim that, in the Engel vs Vitale Case, the Supreme Court " . . . erred in its reading of history . . ." and that the constitutional wall of separation between church and state is a " . . .myth." A state senator, in praising this judge's opinion, held that the framers of the constitution ". . . did not believe in the separation of church and state . . . " and one nationally prominent clergyman has said that school prayer was " . . . in the intent and mind of the 1st Amendment framers." What would Jefferson say to that?

These may be fond wishes, but they are not facts. In 1785-86, Madison and Jefferson, in obtaining the Virginia Bill for Religious Liberty " . . .opposed all religious establishments by law on gounds of principle." When in 1784, the religious conservatives of Virginia tried to revive the idea of multiple church establishment in a tax bill designed to support "Teachers of the Christian Religion", James Madison was the chief opponent, arguing with all his being that an assessment on all citizens to pay teachers of religion was clearly tantamount to " . . . an establishment of religion" and therefore indefensible.

My testimony here is particularly fitting since I am the Superintendent of Schools of the Herricks Public Schools in New Hyde Park, New York, the site of the landmark Engel vs Vitale School Prayer Decision by the Supreme Court in 1962. That prayer was voluntary and non-demoninational to be recited as part of opening day exercises. It was composed by state officials and authorized and recommended by the State Board of Regents. The Supreme Court found it to be unconstitutional. Liberally quoting from the teachings and writings of our Founding Fathers, Justice Black, writing the majority opinion, stated, "The inclusion of a classroom prayer composed by state officials in a daily program for public schools violates the prohibition of the First Amendment, operative against the states by virtue of the Fourteenth Amendment, against the making of a law 'respecting an establishment of religion,' even though the prayer is denominationally neutral and its observance on the part of the students is voluntary." Justice Black also stated, " . . . neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of students is voluntary, served to free it from the limitations of the Establishment Clause."

Aside from the court's opinion, the practical implications of a constitutional amendment requiring voluntary prayer in the classroom are nightmarish. How is a child excused from class if that child does not wish to participate in this voluntary activity? Conformity is a powerful force among children of all ages. In some places, a child would have to be truly heroic to ask to leave the room. And the teacher who does not believe in this practice must now police it. Will his or her attitude become more powerful than the compulsion to pray or be excused? How will teacher-parent relations be affected when they are in disagreement over the product and the process of the proposed amendment? The prospects of disruption, litigation, non-compliance and ridicule are, to say the least, disquieting.

Since 1962, the Court ruling on voluntary prayer has withstood the test of time through a variety of assualts and circumventions. Black did not err in his reading of history but testified for our Founding Fathers in restating ~~the~~ basic Jeffersonian principle of ~~a wall of separation. —~~

Besides, Resolution 73 fails to recognize the contemporary reality of the American school house where Christians, Jews, Muslims, Hindus, Taoists, and other children of disparate religions, as well as those who profess no religious affiliation, coexist in the same classroom. Collective or unison prayer, voluntary or otherwise, would trample on the beliefs of many students and result in an atmosphere of stress and dissension.

As for the formal adoption of a period of silent prayer, AASA is opposed to a constitutional mandate for such practice. The courts, for the most part, have found the period of silent prayer or meditation to be in violation of the Establishment Clause of the 1st Amendment. It is true that individual school districts can be found where such practice is tolerated. However, in Alabama, periods of silent prayers were recently overturned. In New Mexico, a federal judge ruled in February that a New Mexico law allowing a minute of silence in the schools is a violation of the Establishment Clause. In his decision, the judge wrote "... The illness lies in the public perception of the moment of silence as a devotional exercise. If the public perceives the state to have approved a daily devotional exercise in public school classes, the effect of such action is the advancement of religion."

In Massachusetts, the legislature was told by its state supreme court that silent meditations as opposed to prayer would not change the unconstitutionality of the act since the law contemplates that, at least in some instances, prayers would be orally recited. The court stated that when prayers are to be heard in the classrooms of the public schools of the commonwealth, " . . . it is more than a strain to argue that religion is not being advanced in the sense of the Constitution." In other words, during the moment of silence, individuals will pray aloud and make religious gestures. The teacher must either allow such actions or stop them — an untenable and inappropriate responsibility either way.

Finally, AASA opposes a constitutional amendment requiring public schools to grant equal access to school facilities to religious groups throughout the nation.

This is a comparatively new effort to merge church and school. In Bristol, Virginia, bible study classes are held in the school house immediately before and immediately after classes. Students volunteer for the classes. Those who do not are required to go elsewhere in the building during these classes. Court action on this program is pending.

Recently the Supreme Court declined to hear a case involving the right of the Lubbock, Texas schools to hold voluntary prayer meetings in school facilities before or after school hours. Earlier, the U.S. Court of Appeals had ruled against the practice as a violation of the 1st and 14th Amendments. Specifically the Court ruled against a Board of Education policy which permitted students to gather at the school before or after school hours to meet for any " . . . educational, moral, religious, or ethical purposes . . . " so long as the meetings were voluntary. The Court of Appeals found the directive a constitutional violation since it specifically related to "religion in the schools."

The courts appear to be rejecting the concept as constitutionally unacceptable, not out of hostility, but rather a true concern over our heading down a new road of religious establishment.

Aside from the opinion of the court, the AASA recognizes that various school districts throughout the country have, at their own risk, entered into contractual arrangements with religious groups for the temporary use of school facilities, usually for emergency purposes. A constitutional amendment would complicate such voluntary decisions and require all school boards, whether they wished to or not, to grant access to all groups in a way that would surely interfere with school activities. For example, church related activities, following immediately upon student dismissal, would be perceived as an integral part of the school's extra and co-curricular programs. While attendance would be voluntary, it would be apparent to all students in the school that certain religious activity was authorized and, fairly judged or not, established by the Board of Education.

Schools could easily become magnets for all religious groups seeking a new home or additional space. Schools could easily become school-churches. Equipment, materials, and supplies would be in jeopardy and the smooth flow of instruction from day to day would be disrupted. Given the random nature of the groups who would demand access, security would have to be increased and screening would become a full time job.

In effect, the attention, energy, and time of students, teachers, and school administrators could easily be diverted from their primary mission of public education, impeded by such distractions as multiple religious groups competing for the use of public school houses.

In summary, the AASA feels that prayer is a very personal experience and religion an individual matter. Mixing education and religion in the public schools of our diverse society is not wise. Nor is it sound practice to employ the Constitution as a handy remedy to appease those who have been frustrated by court decisions. The Constitution, after all, is the foundation of our national wisdom. The balance of powers provide recourse through the courts to those who feel that their rights have been violated by legislative acts. The interplay of the judicial and legislative branches of government has protected the civil rights of American citizens and sustained this nation's integrity as a democratic society through more than a century of history. That process should be preserved and the proposed constitutional amendments rejected.

Mr. SCOTCH. Dr. Singer, I also extend the apologies of the committee that there is no Senator here. I assure you that the testimony in the printed record will be a permanent record, a very important one, and that your testimony and the testimony of other witnesses is no less important for the presence or absence of Senators in the room.

I do note that we still have a long list of witnesses. I know that you have come with prepared statements. All statements will be fully included in the record. If it is at all possible, I think we ought to try to adhere to the limit of the lights that control our lives during this hearing, so that everybody can get through.

Ms. Goldsmith?

STATEMENT OF JOANNE GOLDSMITH

Ms. GOLDSMITH. Thank you, sir.

I will simply say that my name is Joanne Goldsmith. I am president of the National Association of State Boards of Education. We represent education policymaking bodies in nearly all the States, the U.S. Trust Territories, and the District of Columbia, and I do wish to thank you for bearing with us this afternoon. You certainly feel our frustration, and we appreciate your staff's frustration for being put in this position.

Mr. SCOTCH. We are very, very interested in what you have to say.

Ms. GOLDSMITH. Thank you. I will try to read quickly.

I would like to make it clear at the outset that our association's general policy on the issue before us is that—and this is voted by our general membership at our annual meeting 2 years ago—"It is inappropriate to allow government to organize, prescribe, or direct prayer in the public schools." The constitutional amendment under consideration clearly would permit public schools to both organize and prescribe a time of prayer. It would also allow volunteer student groups to use school facilities predominantly for religious purposes. We must, therefore, strongly oppose its adoption.

The issue, it should be remembered, is not whether any party is for or against religion. Our association deeply respects all religious faiths and the unquestioned right of individuals to follow their beliefs, whether in religious institutions, in their homes, or in their private moments anywhere.

Nor is the question whether the prayer or meditation that would be permissible under the proposed amendment is spoken or silent. We appreciate the attempt to avoid a common argument in school prayer disputes, that spoken prayer by students of a majority religion would exert undue pressure on other students of minority faiths. But the language in section 1 of the proposed amendment, we believe, still violates the overriding issue at stake, that government should not organize or prescribe a time for prayer in the public schools.

We need scarcely say that any individual student, whether somewhere in a school facility, or on a park bench, or anywhere else, may choose to engage in private, silent prayer. Our objection is to government organization and prescription of the moment.

We also oppose section 2 of the proposed amendment to the Constitution. In this instance, our most fundamental objection is that it is unnecessary and that it is unwise to fetter the Constitution with amendments or matters which are already being resolved satisfactorily by the courts and at the local school district level.

There are circumstances, the lower courts have found, in which students who wish to meet in school facilities for religious discussion may do so, and because I am not an attorney, I will not read those cites; you have heard them before today.

We will go on to say the courts have made it clear, in other words, that voluntary, student-initiated prayer groups using school facilities become suspect when such use is not incidental, but dominant. Indeed, so far as we are aware, in every case in which the courts have rejected so-called "neutral, extracurricular use policy," they have done so because they have found that they were adopted for that purpose and had the effect of advancing sectarian ends. We believe that this is a proper test and one which has permitted use of school facilities by religious groups under appropriate circumstances.

The courts also have established other measures of appropriateness in this area: The age and impressionability of the student, the presence or absence of school personnel, the voluntary or involuntary nature of religious activity. But the foremost test is whether such use is predominantly for religious purposes. We agree with these standards and therefore, oppose the policy reflected in the proposed amendment which would allow them to be violated.

We thank you.

Mr. Scotch. Thank you very much.

Mr. Dershowitz.

STATEMENT OF NAT DERSHOWITZ

Mr. Dershowitz. Thank you, Mr. Scotch.

My name is Nat Dershowitz, and I am the general counsel to National PEARL, which is the National Coalition for Public Education and Religious Liberty. I am also the director of the Commission on Law and Social Action of the American Jewish Congress.

I would like to thank the committee for having me here, and I am testifying in my capacity as the general counsel for PEARL, of which the National Education Association is a member.

Before testifying, however, I think I would be remiss if I did not state my views as to the nature of these hearings. These hearings seem to be the only hearings dealing with an effort to amend the Constitution of the United States, the Bill of Rights, and the first amendment to the Bill of Rights. It appears as if these hearings are truncated hearings, scheduled to last a maximum of 1 day, at which we have had only a few Senators appearing. I find it extremely distressing that we are holding such short hearings, and second, that they are not receiving the attention that is necessary. To amend the Constitution of the United States, or to consider amending the Constitution of the United States, under these circumstances is quite disturbing.

What is even more distressing is that this is the first time we have ever had an amendment proposed to the U.S. Constitution to modify not Supreme Court decisions, but lower court decisions. There are no direct Supreme Court decisions on-point. We are dealing here with section 1, with an amendment relating to silent meditation, a matter which has been before a number of the District Courts, but has never reached the U.S. Supreme Court; section 2, the "equal access" amendment, also would overturn decisions of the lower Federal courts, and not those of the U.S. Supreme Court.

So, for the first time in our 200-year history, we are holding hearings on amending the Bill of Rights to deal with lower court Federal decisions and not with decisions of the U.S. Supreme Court.

But putting aside procedure for a moment and putting aside for a moment the fact that this is not dealing with Supreme Court decisions, on the merits, we are opposed to both aspects of the proposed constitutional amendment. I previously testified in opposition to Senate Joint Resolution 73, and Joel Levy earlier today presented testimony in behalf of the American Jewish Congress, which we adopt in opposition to the silent meditation provision.

What I would like to do in the few minutes that I have is deal with the question of so-called equal access. We believe that those courts which have concluded that students should not be permitted to organize religious clubs on campuses have correctly interpreted the Constitution. I believe it is appropriate, in the moment or two that I have, to discuss just one aspect of that issue and that is the troublesome question which arise in these cases relating to teacher supervision of student religious clubs a practice not precluded by the Hatch proposal.

The presence of a teacher is not a neutral factor in the student's decision whether or not to participate in a particular club. In some cases, students will view a particular teacher as a role model and therefore, imitate him or her as much as possible. Conversely, a student who desires not to participate in a religious club may feel ill-at-ease in the sponsoring or supervising teacher's regular class because of that refusal. This Government thumb on the scale is constitutionally objectionable. The only decision to date which permits such clubs to function, namely, in *Bender* v. *Williamsport Area School District,* did not by any means adopt the so-called equality argument that is being advanced as the basis for section 2. The Court emphasized there that the religious clubs in question had disavowed any aid from the schools, such as the announcements over the loudspeaker, publicity on public bulletin boards, and the like The authority thus was limited to the use of the empty classroom and not, as the proposal will have it, equality in general. In addition, the proposal would probably require that some of the financial subsidies that go to the clubs also go to subsidize the religious schools.

What is at the heart of this amendment is the dissatisfaction with the special status accorded religion by the Constitution and by the relevant Supreme Court decisions. But this special status is what we view as so significant. On this central question we disagree with the sponsors of this amendment. Religion, the argument made in support of the amendment goes, should not be treated any differently than comparable secular activities, whether in terms of funding, access or governmental benefit. The argument, of course, is not pressed to its logical extreme. Rather, the proponents of this amendment wish to see religion given the special benefits of the free exercise clause, but none of the disadvantages of the establishment clause.

Let me end by quoting Judge Adams of the third circuit, who held that "A rose cannot be had without the thorn." When one is dealing with the issues of religion, one has to balance the free exercise and the establishment clause, or at least try an reconcile the two. The proposal here does not seek appropriately to recognize the establishment clause problems that are inherent in its provisions.

Thank you very much.

Mr. SCOTCH. Thank you.

Mr. BOWMAN. Ms. Goldsmith, you came here to speak on the silent prayer equal access bill, did you not?

Ms. GOLDSMITH. Yes.

Mr. BOWMAN. And your association is opposed to that?

Ms. GOLDSMITH. Yes.

Mr. BOWMAN. Does your association have a position on the President's amendment, Senate Joint Resolution 73?

Ms. GOLDSMITH. We would also oppose that, sir, as unnecessary.

Mr. BOWMAN. Thank you.

Mr. SCOTCH. Thank you very much.

I should add—and for the panels that have preceded you, this applies, as well—that whether they appear or not, Senators may want to pose questions after the close of today's proceedings, and I hope that you would all be open to submitting answers for the record.

As I think earlier people at the podium have indicated, there is a big agenda today, just by coincidence, but they will be interested in hearing what you have to say, and I am certain that some of you will get questions posed in writing.

Ms. GOLDSMITH. We would be happy to answer them, on behalf of my association.

Dr. SINGER. Yes.

Mr. DERSHOWITZ. So would we, and thank you very much.

Mr SCOTCH. Thank you all very much.

The balance of the witnesses for this day's hearings are stated in order. I am going to invite you to come up in panels in the order in which you are listed, because I think it will be more convenient to approach it that way.

The next three witness organizations listed are the American Family Seminar, the B'nai B'rith Women, and the Christian Legal Society. Could I invite you all to come up at this time?

Again, your full written statements will be included in the record. I would ask you at this time to try to summarize your remarks if they are longer than the allotted time.

Again, let us proceed from right to left this time, and kindly identify yourselves for the record when you speak.

STATEMENT OF A PANEL, INCLUDING JAMES ALLMAN, ON BEHALF OF AMERICAN FAMILY LIFE SEMINARS, SAN DIEGO, CA; SAMUEL E. ERICSSON, CENTER FOR LAW AND RELIGIOUS FREEDOM, CHRISTIAN LEGAL SOCIETY, AND RITA SALBERG, CHAIRMAN OF PUBLIC AFFAIRS, B'NAI B'RITH WOMEN

Mr. **Allman.** My name is James Allman, and I am representing Dr. Tim Lahay, who is the president of Family Life Seminars, San Diego, CA, which represents over 100,000 families and 13,000 ministers throughout the Nation.

We would like to reflect upon the heritage that has been handed down to us. Such statements as given by William Penn in 1681, as, "If you are not governed by God, you will be ruled by tyrants." In 1787, Benjamin Franklin made this statement: "Here is my creed. I believe in one God, the creator of the universe, that He governs it by His providence, that He ought to be worshiped."

In the Constitutional Convention, Benjamin Franklin stated:

> I have lived, sir, a long time, and the longer I live, the more convincing proofs I see of this truth, that God governs in the affairs of men. And if a sparrow cannot fall to the ground without His notice, is it probable that an empire can rise without His aid?

In 1787, George Washington in his Thanksgiving Day proclamation stated:

> Whereas it is the duty of all nations to acknowledge the providence of almighty God to obey His will, to be grateful for His benefits, and humbly to implore His protection, aid and favors, now, therefore, do I assign and recommend Thursday, the 26th day of November next that we may then all unite in rendering unto Him our sincere and humble thanks for His care and protection of the people of this country and for all the great and various favors which He has been pleased to confer upon us.

John Quincy Adams, on July 4, 1821, said:

> From the day of the Declaration, the American people were bound by the laws of God, which they all, and by the laws of the Gospel, which they nearly all acknowledged as the rules of their conduct.

Abraham Lincoln in 1861, in his farewell words in Springfield, IL on February 11, stated:

> Unless the great God who assisted Washington shall be with me and aid me, I must fail, but if the same omnicient mind and mighty arm that directed and protected him shall guide and support me, I shall not fail; I shall succeed. Let us all pray that the God of our fathers may not forsake us.

And finally, in 1863, Abraham Lincoln in his Gettysburg Address stated that:

> This Nation, under God, shall have a new birth of freedom, and that government of the people, by the people, and for the people shall not perish from this earth.

We favor the administration's proposal because we believe that America needs a prayer amendment to the Constitution to once again permit our schoolchildren who choose to do so to take time each day to acknowledge their dependence on God through prayer in much the same manner as did our Founding Fathers and as does the U.S. Supreme Court and Congress.

Ever since the 1962 Court decision to outlaw public prayer in public schools, a consistent secularization of our schools has taken place. This is discriminating against the God-fearing majority of our Nation's people so that in some communities, our young people cannot even use our tax-supported schools for voluntary prayer meetings.

Freedom of religion was one of the foundation stones upon which this country was founded. Presently, we do not have freedom of religion in the public schools.

A recent Court decision has made it possible for college students to meet for voluntary prayer, but continue to discriminate against such a practice in high school. An amendment acknowledging voluntary prayer in school is in no way sectarian or favoring one religion over another. It is merely an acknowledgement of the fact that this country is not areligious or antireligious. A Gallup poll indicates that 94 percent or more of our population believe in God. Consequently, this majority should have the right under the Constitution for their children to attend school where they are taught, through the practice of prayer, to acknowledge the existence of a supreme being. The passage of this amendment would assure this right for all America's children without coercing those from nonbelieving homes.

I respectfully urge the approval of this amendment.

Thank you.

Mr. SCOTCH. Thank you, sir.

Ms. Salberg.

STATEMENT OF RITA SALBERG

Ms. SALBERG. Good afternoon. My name is Rita Salberg, and I am the chairman for public affairs for the B'nai B'rith Women, and a member of the executive board of the Anti-Defamation League of B'nai B'rith.

I am here today on behalf of the 120,000 members of B'nai B'rith Women to tell you of our opposition to the proposed bill to amend the Constitution to allow prayer in the schools. We believe it is not good Government policy, good religious practice, or good educational programming.

It is our firm belief that the protections of democracy can only be maintained by a clear and strict separation of church and state, a separation we believe that is violated by the proposed prayer amendment.

As a Jewish organization, we are particularly mindful of the strong historical tendency of government and religion to intermix, and with disastrous consequences for minorities.

The genius of the Bill of Rights is that it serves to limit the rights of the majority in particular instances, thereby granting protections to minorities. As our country becomes every more ethnically and religiously diverse, such protections assume an even greater importance.

It seems to me that the proposed legislation is particularly vulnerable to criticism from a religious standpoint. If a prayer could be devised that is acceptable to all—and I am now thinking of the recent influx into our country of people from Southeast Asia, many of whom have a heritage apart from the Judeo-Christian one—that prayer would necessarily be so homogeneous as to be meaningless. We who share religious belief, however different the form, know that true prayer cannot be stopped by any court, just as true praying cannot be mandated by Federal or State law.

In fact, there is a strong argument to be made that mechanical recitation of prayer in a public school, especially, a prayer composed by Government officials with a need to make that prayer have a wide acceptability, such a prayer degrades the religious experience that is true prayer. If the aim of a prayer in the schools is to inculcate in children ethical and moral standards, that can and should be done outside the context of prayer. To my mind, there is surely a place for prayer in children's lives, and that place is in the home, in the church, synagogue, mosque, in many places, but not our public schools.

I was a teacher in the New York City schools for 15 years The purpose of the public school system was, it always seemed to me, best stated by the late Justice Douglas. He described a public school as a place—

> To train American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions.

I would be the last to say our schools are free of divisiveness or that they are havens from strife and conflict. They surely are not. Children from an early age are aware of racial and religious differences and conflicts—at least, that has been my experience. But the role of the public school system is not to exacerbate these differences. Rather, schools are the places to emphasize our commonality and our oneness. In our richly pluralistic country, that oneness is not to be found in a religious belief or in a prayer.

Good educational policy also calls for us to look at our differences, but to look at them in a constructive way. From the experience of Jewish people I have spoken with over the years, our differences are not addressed positively through praying in school. In fact, quite the contrary. I know people who suffered in varying degrees, from what was once the common practice of praying in schools. Most stinging was the experience of one friend, the only Jewish child in her class, who had the misfortune to have as a teacher a woman who called on her regularly to read from the New Testament the passage on the "perfidious Jew." The adjective was removed from the New Testament during Vatican II. For her and for others I know, prayer in the schools was far from a positive experience. It was not even a benign experience. It was hurtful and destructive, although the intent of the practice was quite the opposite. To those who argue, what harm can prayer in the schools do to children, I say it can do a lot of harm.

As members of one of the largest religious minority groups in the country, B'nai B'rith Women urges you not to proceed with legislation that will put prayer in any form back into our schools.

Thank you.

Mr. SCOTCH. Thank you very much.

Mr. Ericsson.

STATEMENT OF SAMUEL E. ERICSSON

Mr. ERICSSON. My name is Samuel Ericsson. I am director of the Washington, D.C. Office of the Christian Legal Society and its Center for Law and Religious Freedom.

Mr. Chairman, I want to thank you and the members of this committee for the privilege of addressing issues concerning religious activities in our Nation's public schools.

I join with the distress articulated by Congressman Buchanan, Mr. Gershowitz, and Dr. Singer, in terms of the absence of any Senators at this hearing at this time.

In the conduct of the activities of the Center, no inquiry comes to us more frequently than those that reflect uncertainty and confusion on the part of school administrators, teachers, and students on the rights of students to religious expression on public school campuses.

Over the past two decades, nearly 200 different amendments to the Constitution have been proposed in response to the decisions by the Supreme Court in the early 1960's, invalidating state-composed prayers and state-initiated, school-sponsored and teacher-led devotional exercises in the public school classroom.

In just the past 12 months, the Senate has heard well over 80 witnesses presenting well over 1,000 pages of testimony in the latest chapter of the debate. My primary focus this afternoon will be on the "equal access" concept, which we believe is the brightest light at the end of this controversy.

Briefly, equal access allows in the public schools wholly student-initiated and student-run extracurricular meetings with religious content on the same basis as extracurricular meetings by those students who pursue nonreligious interests—in a word, religious speech should not receive second-class treatment and be denigrated as subject matter for discussion.

I want to raise four questions. First, does equal access already enjoy constitutional protection; second, should the courts or the Congress formulate and design the remedy needed in this area; third, is an equal access amendment necessary, and fourth, a comment on silent prayer.

The most significant development since this committee last heard testimony on the school prayer issue is a decision by the Federal District Court in Pennsylvania, *Lisa Bender* v. *Williamsport Area School District,* decided on May 12, 1983. I am one of the attorneys in that case and represented the plaintiffs.

In the *Bender* case, the Williamsport School District adopted a policy establishing a regularly scheduled activity period on Tuesday and Thursday mornings to encourage students to organize clubs and groups and hold meetings at its high school. A group of students requested permission to form a club which would use the period to read scripture, pray, discuss religious questions, and engage in other activities of interest to the group. The school has a student body of 2,500. At the first meeting, some 40 high school students attended the meeting, and after that, the request for any further meeting was denied.

No student or organization had previously been denied the opportunity to participate in the activity period. On May 12, 6 weeks ago, the court ruled in *Bender* that the denial of the request was a violation of the "equal access" rights under the free speech clause of the first amendment, and that wholly student-initiated and student-run religious groups can meet during the activity period without violating the establishment clause. The case is now on appeal to the third circuit court of appeals.

The *Bender* decision is consistent with all prior decisions by the U.S. Supreme Court with respect to religious activities in public schools. First of all, it is consistent with Widmar in allowing student-initiated and student-run meetings on public school properties—even though *Widmar* was a university case, and *Widmar* reserved the question of whether the establishment clause prevents application of equal access at the secondary and primary school levels. We believe the rationale of the *Bender* decision will be upheld on appeal.

Second, equal access does not seek to put the public schools back into the religion business. It is consistent with the decision of *McCollum* v. *Illinois Board of Education,* which held unconstitutional the use of public school facilities for teaching "the faith" by teachers under the direct supervision of the public schools. Equal access focuses on the rights of students to share their religious beliefs and ideas, not on the rights of teachers to indoctrinate students in any specific faith.

Third, equal access is consistent with *Engel* v. *Vitale,* which invalidated State-composed prayers to be recited by public school children. The only prayers offered under equal access are those that students initiate in a wholly voluntary setting, free from any State or school sponsorship.

Fourth, equal access does not reinstate public school teachers in the role of priest or minister in the classroom, leading children in some devotional exercises and is therefore consistent with *Abington* v. *Schempp,* which struck down teacher-led religious exercises in the classroom.

Fifth, equal access does not give preferred treatment to students with religious interests, but merely allows such students to meet on the same basis as students who meet to pursue nonreligious interests. We are opposed to having a sign on public school gates that states, in effect, that all subject matters are appropriate for discussion in a group of students except for religion. We feel that violates the spirit of the first amendment.

Sixth, under equal access, public schools do not unconstitutionally advance any specific religious belief or religion in general. Equal access simply manifests the constitutional requirement expressed by Justice Douglas in *Zorach* v. *Clausen,* that public schools make appropriate accommodations for students' religious interests.

Seventh, the denial of equal access manifests hostility toward religion, which is forbidden by the establishment clause.

Eighth, equal access allows students to participate in truly voluntary religious speech. It is not imposed on them by the school, nor do they seek to impose their religious beliefs on nonparticipating fellow students. There is no captive audience under equal access. No student is exposed to any particular religious view unless he voluntarily seeks out a meeting with fellow students to discuss religious topics. Students would have to go out of their way to get religion.

Ninth, equal access does not discriminate against or intimidate nonparticipating students. No student is forced to sit through prayers or devotional exercises led by teachers, and students are not faced with the embarrassment of having to step outside during a classroom devotional exercise.

Finally, the role of the teacher or other responsible adult can be limited to a simple, custodial role of keeping order and taking attendance. In the *Bender* case, the teacher present simply opened the door, took attendance, and graded papers, while the students had their 1 hour of Bible study and prayer time. There is no need for the teacher to get involved in the content of the discussion.

Should Congress or the courts provide the remedy? We suggest that a constitutional amendment is inappropriate and unnecessary at this time, either in line with what the President has proposed or what Senator Hatch has proposed. We believe, however, that a statute along the lines of Senator Hatfield would be an appropriate remedy. Even though the courts will be reviewing the *Bender* decision on appeal, it will be a number of years before any final decision is rendered there.

Finally, the great risk that we see in the equal access amendment is that when you amend the Constitution to add a new right, you are in effect saying that that right does not exist currently. We feel that is sending out a message that would be more confusing and exacerbate the current situation in this very controversial area.

Thank you so much for the opportunity to share our views.

Mr. SCOTCH. Thank you very much.

[The following was received for the record:]

PREPARED STATEMENT OF SAMUEL E. ERICSSON

Mr. Chairman, I want to thank you and the members of this Committee for the privilege of addressing issues concerning religious activities in our Nation's public schools. In the conduct of the activities of the Center for Law and Religious Freedom of the Christian Legal Society (CLS), no inquiry comes to us more frequently than those that reflect uncertainty and confusion on the part of school administrators, teachers, and students on the rights of students to religious expression on public school campuses.

Over the past two decades, nearly 200 different amendments to the Constitution have been proposed in response to the decisions by the Supreme Court in the early 1960's invalidating state-composed prayers and state-initiated, school-sponsored and teacher-led devotional exercises in the public school classroom. In the past twelve months, the Senate has heard over 80 witnesses presenting well over 1,000 pages of testimony in the latest chapter of this debate.

My primary focus will be on the equal access concept which CLS believes to be the brightest light at the end of the controversial school prayer tunnel. Briefly, equal access allows in the public schools wholly student-initiated and student-run extracurricular meetings with religious content on the same basis as extracurricular meetings by those students who pursue nonreligious interests. In a word, religious speech cannot receive second-class treatment.

We commend the Senate and this Committee for its initiative in focusing on equal access. We are greatly encouraged by the wide bipartisan support this concept has gained already in the Congress. We believe it will win the day. At the present time, there are nearly 30 Senators, representing both parties, from conservative to liberal, who embrace some version of equal access as a legislative solution.

EQUAL ACCESS ALREADY ENJOYS CONSTITUTIONAL PROTECTION

The most significant development since this Committee last heard testimony on the school prayer issue is the decision by the Federal

District Court in Pennsylvania, Lisa Bender v. Williamsport Area School District, decided on May 12, 1983. In the Bender case, the Williamsport School District adopted a policy establishing a regularly scheduled activity period on Tuesday and Thursday mornings to encourage students to organize clubs and groups and hold meetings at its high school. A group of students requested permission to form a club which would use the period to read Scripture, pray, discuss religious questions, and engage in other activities of interest to the group. The request was denied. No student or organization previously had been denied the opportunity to participate in the activitiy period.

The court ruled in Bender that the denial of the request was a violation of the equal access rights under the Free Speech Clause of the First Amendment and that wholly student-initiated and student-run religious groups can meet during the activity period without violating the Establishment Clause. The case is now on appeal to the Third Circuit Court of Appeals. I am one of the attorneys of record in the Williamsport case.

The Bender decision confirms the constitutionality of equal access in the public school context. First, the Supreme Court has held that equal access exists as a fundamental constitutional right with respect to university students, where the religious meetings were student-initiated and student-run and received only incidental benefits from the state on the same basis as non-religious meetings, with no appearance of state sponsorship. Widmar v. Vincent, 454 U.S. 263 (1981). Although the Widmar court reserved the question whether the Establishment Clause prevents application of the equal access principle to protect religious speech at the secondary and primary school levels, the rationale of the Bender decision extends Widmar to the secondary school level.

Second, equal access does not seek to put the public schools back into the religion business. The Bender court found that equal access is not inconsistent with the decision of McCollum v. Illinois Board of Education, 333 U.S. 203 (1948) which held as unconstitutional the use of public school facilities for teaching "the faith" by teachers under the direct supervision of the public schools.

Equal access focuses on the rights of students to share their religious beliefs and ideas, not on the rights of teachers to indoctrinate students in any specific faith.

Third, the *Bender* decision found that equal access is not inconsistent with *Engel* v. *Vitale*, 370 U.S. 421 (1962), which invalidated state-composed prayers to be recited by public school children. Under equal access, the only prayers offered are those that students initiate in a wholly voluntary setting free from any state or school sponsorship.

Fourth, *Bender* also found that equal access does not reinstate public school teachers in the role of priest or minister in the classroom leading children in devotional exercises and is therefore consistent with *Abington School District* v. *Schempp*, 374 U.S. 203 (1963), which struck down teacher-led religious exercises.

Fifth, the *Bender* court determined that equal access does not give preferred treatment to students with religious interests but merely allows such students to meet on the same basis as students who meet to pursue nonreligious interests.

Sixth, under equal access, public schools do not unconstitutionally advance any specific religious belief or religion in general. Equal access simply manifests the constitutional requirement that public schools make appropriate accommodations for students' religious interests, consistent with *Zorach* v. *Clauson*, 343 U.S. 306 (1952).

Seventh, the *Bender* court found that the denial of equal access manifests hostility toward religion, which is forbidden by the Establishment Clause.

Eighth, equal access allows students to participate in truly *voluntary* religious speech. It is not imposed on them by the school nor do they seek to impose their religious beliefs on nonparticipating fellow students. There is no "captive audience" under equal access. No student is exposed to any particular religious view unless he voluntarily seeks out a meeting with fellow students to discuss religious topics. Students would have to go out of their way to get religion.

Ninth, equal access does not discriminate against or intimidate nonparticipating students. No student is forced to sit through prayers or devotional exercises led by teachers. Students are not faced with the embarrassment of having to step outside during a classroom devotional exercise in which they do not want to participate.

Tenth, the Bender court found that the role of the teacher or other responsible adult can be limited to a simple custodial role of keeping order and taking attendance. The teacher or other responsible adult chosen to "monitor" the meetings would be functionally equivalent to a security guard at a religious rally in a public park.

Eleventh, equal access does not require any impermissible financial expenditures from public school funds in violation of the Establishment Clause. The de minimis cost for heating and lighting in the meeting rooms is a permissible incidental benefit accorded to those students with religious interests on the same basis as students meeting with nonreligious interests.

A LEGISLATIVE REMEDY IS CONSTITUTIONAL AND WISE PUBLIC POLICY

The testimony by constitutional scholars and law professors before this Committee makes it clear that equal access is an integral part of the fabric of the First Amendment. Witnesses, including Professor Laurence Tribe of Harvard Law School, Professor Walter Dellinger of Duke University School of Law, Dean Terrance Sandalow of the University of Michigan Law School, and Dean Norman Redlich of the New York University School of Law, have all indicated that with appropriate guidelines, the Widmar principle of equal access and content neutrality extends to the public schools. A central question is whether the courts or Congress should draft the necessary guidelines protecting students' equal access rights.

Some insist that this issue be left to the courts to develop guidelines in the appropriate case or cases. Some believe that Bender may be the right case and they may be correct. However, by its very nature, the judicial system deals with issues on a bits and pieces basis and are not inclined to give comprehensive guidelines to complex issues such as that raised by equal access.

It is therefore incumbent on the Congress to act. A fundamental constitutional right is in issue. Congress has general authority under Section Five of the Fourteenth Amendment to enact legislation requiring states to respect fundamental constitutional rights of free speech and free association. Equal access, a fundamental incident of the right of freedom of speech, falls well within the due process and equal protection obligations imposed on the states by the Fourteenth Amendment. Congress therefore has the authority to enforce equal access principles upon state administered public schools by appropriate legislation. Moreover, Congress has broad powers to attach conditions to its grant-in-aid programs as long as those conditions are themselves constitutional.

Congress should not delay in providing a comprehensive legislative remedy for this basic First Amendment right guaranteed to the 45 million public school students in the United States.

THE GREAT RISK OF AN EQUAL ACCESS AMENDMENT

Equal access for public school students for extracurricular religious speech and association is resident in the fabric of the First Amendment. To add a "new right" in the form of an Equal Access Amendment will greatly exacerbate the current confusion with respect to this issue. If an Equal Access Amendment was sent to the states for ratification, school administrators, counsel and many courts will have a strong basis for denying equal access to those students with religious interests. One could argue persuasively that Congress would not foolishly add a "new right" to the Constitution if such right already exists. Since Congress chose to add a "new right", it follows that the right is currently not available. Thus, in our opinion, an Equal Access Amendment would simply be a confusing patch to the First Amendment. It is unnecessary and runs the risk of potentially broad denials of religious freedoms currently enjoyed by students in public schools.

A COMMENT ABOUT SILENT PRAYER

At this time, the Supreme Court has not yet ruled on whether silent prayer or meditation is constitutional. Many constitutional scholars have testified before this Committee that they believe such activities in the public schools is protected by the First Amendment. However, if Congress were to pass an amendment adding the right to "silent prayer or meditation" to the Constitution, then silence will soon become the standard to be followed with respect to all religious activities in the public schools. If the Constitution considers that silence is golden for prayer, then certainly silence is golden for all other religious activities. This would severely denigrate religious freedoms that now exist on public school campuses. There is simply no need to fix that which is not broken.

Mr. SCOTCH. In order on our witness list next is the National Council of Jewish Women, the Anti-Defamation League, and the American Jewish Committee. Would those witnesses please come forward?

Thank you all for coming. Again, the committee apologizes for the lateness of the hour, some of the confusion that attended after the lunch hour, and the fact that there is no Senator present.

Again, your entire testimony will be in the record as if the full committee had been here. We do have time constraints, and we will start.

Kindly identify yourself, and we will start this time from the left side of the table.

STATEMENT OF A PANEL, INCLUDING SAMUEL RABINOVE, LEGAL DIRECTOR, THE AMERICAN JEWISH COMMITTEE; RUTI G. TEITEL, ASSISTANT DIRECTOR, LEGAL AFFAIRS DEPARTMENT, ANTI-DEFAMATION LEAGUE; AND JANICE KATZ, VICE-CHAIRWOMAN, CAPITAL COMMITTEE, NATIONAL COUNCIL OF JEWISH WOMEN

Mr. RABINOVE. I am Sam Rabinove. I am legal director of the American Jewish Committee.

I will abbreviate our testimony, which has been submitted for the record.

It is simply not a proper function of our Government to compose or to sponsor prayers for American children to recite. In the words of conservative libertarian columnist, James J. Kilpatrick, writing in the Washington Post on December 10, 1981, "The state simply has no business in the religion business. The best solution is to leave a child's religious instruction where it belongs, in the home, in the church, in the temple, in his mind and heart."

It should be stressed, however, that nothing in the Supreme Court rulings prevents any public school pupil from praying, either silently or aloud, whenever he or she feels like it, provided only that the school program is not interfered with.

There are, in fact, public school children today who have stated clearly that they have engaged in serious prayer during school hours—before examinations, for example. To the best of our knowledge, nobody has ever interfered or denied their right to do so. It would seem, therefore, that there is no need whatever for a constitutional amendment to permit individual silent prayer or meditation in public schools. As a matter of fact, when I was a child, I prayed to God in public school, privately and individually. If I were a child today, I would feel equally free today to do the same thing.

It is important to note that the practices which would be permitted by the proposed amendments, either of them, would not take place in a social vacuum. In hundreds of public school districts throughout the country today—for example, Bristol, VA and Reidsville, NC—organized spoken prayer, Bible reading and religious proselytization—are taking place on a regular basis, in outright defiance of the Supreme Court decision in *Abington School District* v. *Schempp*, and in *McCollum* v. *Board of Education*. Citizens who dare to challenge such practices frequently are threatened, insulted, and ostracized, as are their children in the public schools. If either of these amendments were to be adopted, such violations could be expected to proliferate.

One may wonder why there exists this apparent preoccupation with the need to intrude group prayer or meditation into our public schools. With some, it seems almost an obsession. We do face a crisis in public education. We all have a vital interest in upgrading the quality of the education now being received and experienced by American children, in the sciences and in mathematics in particular. But the controversy over prayer and meditation has nothing whatever to do with this. In fact, it is a smokescreen and a distraction from what ought to concern all of us. If we are truly serious about what is going on and what is not going on in our public schools, what is urgently needed, I submit, is to restore the Federal funds that have been slashed from educational assistance programs.

It is indeed the task of the public schools to reflect and to help inculcate the highest moral and ethical values of our society, as well as to develop character and responsible citizenship. But if this is the main concern of the sponsors of the proposed amendments, it must be said that permitting prayer, whether group prayer or individual prayer or silent prayer or spoken prayer or meditation, would hardly suffice to serve these purposes. What does belong in public schools, however, is the teaching of common core values—honesty, decency, compassion, patriotism, fairness, respect for the rights and freedoms of others—that are broadly shared by people of all denominations and none. Nor is there anything in U.S. Supreme Court decisions to preclude such instruction, provided only that it not be couched in religious terms. These values can be taught far more effectively by adult example and by the day-to-day behavior of parents, school principals, administrators and teachers than by group prayer or meditation.

In sum, we believe not only that there is no need for the proposed amendments, but also that they carry within them the seeds of great potential for mischief. We seriously question their wisdom. Clearly, they tamper with the first amendment, the centerpiece of the Bill of Rights, which has stood Americans in good stead since its adoption in 1791, and which should remain inviolate. The first amendment protects the rights of heretics, infidels, and dissenters—and as well as everybody else—thank God for that. To paraphrase a current popular expression, it is not broke, so it does not need to be fixed.

We urge, therefore, that both of these proposed amendments be rejected. Thank you for the opportunity to be heard.

Mr. SCOTCH. Thank you.

[The following was received for the record:]

PREPARED STATEMENT OF SAMUEL RABINOVE

On behalf of the American Jewish Committee, I very much appreciate the opportunity to testify on the Hatch Amendment, a proposed constitutional amendment which, in part, would permit individual or group silent prayer or meditation in public schools. We wish to speak in opposition to this section of the amendment (Section 1) and urge that it be rejected, essentially because it would have the effect of amending the First Amendment.

The beneficent teachings of religion have contributed immeasurably to human progress from barbarism to civilization. Our nation, in particular, settled in large measure by people who were yearning for freedom of conscience, having fled religious persecution, has been profoundly influenced by religious concepts. Every variety of denominational belief has flourished in this country, hand in hand with the American tradition of separation of church and state, which has served as a bulwark of religious liberty. The principle of separation of religion and government, as guaranteed by the First Amendment, is indeed one of the cornerstones of our freedom. It should be reinforced, not eroded. Underlying the Establishment Clause of the First Amendment was the conviction on the part of the Founding Fathers that any union of government and religion inevitably would impair government and would degrade religion. And tax-supported, non-sectarian public schools have served as a unifying force in American life -- welcoming young people of every creed, seeking to afford equal educational opportunity to all, emphasizing our common heritage and serving as a training ground for community living in our pluralistic society.

In 1962 the U.S. Supreme Court, in Engel v. Vitale, ruled that the recital of a state-composed ostensibly non-denominational prayer by public school children at the start of each school day violated the First Amendment. And the following year, in Abington School District v. Schempp, the Court struck down a program in which passages from the Bible were required to be read and the Lord's Prayer recited. The rationale for these decisions is as compelling as ever. The Lord's Prayer, for example, is a Christian prayer. And no prayer, however neutral it may seem, can ever be truly non-denominational. In attempting to incorporate the tenets of several major religions, the meaning of prayer can only be diluted.

It is simply not a proper function of our government to compose or to sponsor prayers for American children to recite. In the words of conservative libertarian columnist James J. Kilpatrick, writing in the Washington Post of December 10, 1981: "The state simply has no business in the religion business.... The best solution is to leave a child's religious instruction where it belongs, in the home, in the church, in the temple, in his mind and heart."

It should be stressed, however, that nothing in the Supreme Court rulings prevents any public school pupil from praying, either silently or aloud, whenever the spirit moves him or her to do so, provided only that the school program is not disrupted thereby. There are public school children today who have stated that they have engaged in serious prayer during school hours (before examinations, for example), and, to the best of our knowledge, nobody has ever interfered or denied their right to do so. It would seem, therefore, that there is no need whatever for a constitutional amendment to permit individual silent prayer or meditation in public schools. (When I was a child, I personally and privately prayed in public school. I would feel equally free to do so today.

Group silent prayer or meditation in public schools, however, may be another matter entirely. While there could be a situation where children may wish to come together, of their own volition, for group silent prayer or meditation, that is hardly a frequent occurrence. It is far more likely, in our view, that Section 1 of this proposed amendment would be seized upon by those in government, who are determined to restore organized, officially sanctioned prayer in public schools, to use the machinery of the public schools to require that time be allotted for group silent prayer or meditation. This, we believe, would open the door to serious abuses and would surely violate the spirit of the Establishment Clause of the First Amendment.

It is important to note that the practices which would be permitted by the proposed amendment would not take place in a social vacuum. In hundreds of public school districts throughout the country (for example, Bristol, Virginia and Reidsville, North Carolina) organized spoken prayer, Bible reading and religious proselytization are taking place today on a regular basis, in outright defiance of the Supreme Court decision in Schempp. Citizens who dare to challenge such practices frequently are threatened, insulted and ostracized, as are their children in the public schools. If ~~this~~ either of these amendments were to be adopted, these violations could be expected to proliferate.

One may wonder why there exists this apparent preoccupation with the need to intrude group prayer or meditation into our public schools. With some, it seems almost an obsession. We do indeed face a crisis in public education. We all have a vital interest in upgrading the quality of the education now being received and experienced by American children, in the sciences and in mathematics in particular. But the controversy over prayer and meditation has nothing whatever to do with this. In fact, it is a "smokescreen" and a distraction from what ought to concern us all. If we are truly serious about what is going on -- and what is not going on -- in our public schools, what is urgently needed is to restore the Federal funds that have been slashed from educational assistance programs.

It is indeed the task of the public schools to reflect and to help inculcate the highest moral and ethical values of our society, as well as to develop character and responsible citizenship. But if this is the main concern of the sponsors of Section 1 of the proposed amendment, it must be said that permitting group silent prayer or meditation would hardly suffice to serve this purpose. What does belong in public schools, however, is the teaching of common core values -- honesty, decency, compassion, patriotism, fairness, respect for the rights of others -- that are broadly shared by people of all denominations and none. Nor is there anything in U.S. Supreme Court decisions to preclude such instruction, provided it is not couched in religious terms. These values can be taught far more effectively by adult example and by the day-to-day behavior of parents, school principals, administrators and teachers than by group silent prayer or meditation.

In sum, we believe not only that there is no need for Section 1 of the proposed amendment, but also that it carries within it the seed of great potential for mischief. We question its wisdom. Clearly, it tampers with the First Amendment, the centerpiece of the Bill of Rights, which has stood Americans in good stead since its adoption in 1791 and which should remain inviolate. To paraphrase a current popular expression, it is not broke and does not need to be fixed. We urge, therefore, that Section 1 be rejected.

Respectfully submitted,

Samuel Rabinove
Legal Director

Mr. SCOTCH. Ms. Teitel?

STATEMENT OF RUTI G. TEITEL

Ms. TEITEL. My name is Ruti Teitel. I am the assistant director of the Legal Affairs Department of the Anti-Defamation League.

The Anti-Defamation League opposes this amendment. Since 1913 when it was founded, the Anti-Defamation League has been committed to protecting religious freedoms in this country, just as did our Founding Fathers, by maintaining a wall of separation between church and state.

The instant proposal, we submit, threatens these protected religious freedoms. The amendment before us today seeks to make equal what is not equal. In the name of so-called equal access, it proposes to allow prayer and meditation in our public schools and to treat clubs devoted to religious worship just as those devoted to stamp collecting or hockey. There is something disingenuous in all of this.

Religion in America's political system has never been treated equally with secular activities. It is precisely because of the special nature of religion that the Founding Fathers distinguished religion, by making particular provisions for religion in the Constitution through the first amendment's establishment and free exercise clauses. These provisions are concerned with demarcating the place of religion and government in our society—a chief concern of the Founders of this country, because of the historical alignment of government with religion in Europe, which resulted in persecution of minorities and the resettlement in the New World.

The central purpose, then, of the establishment clause "rested on the belief that a union of government and religion tends to destroy government and to degrade religion."

It is because of the more than equal first-class status of religion in our system that we have these special constitutional protections. As Madison wrote, it is because "religion is too personal, too sacred, too holy."

This thought, that something so personal and sacred as religion should not be in the public schools but rather, should be at home or in places of worship, is labeled by some proponents of this amendment as hostile to religion and as "Soviet" in nature. This notion is misbegotten. It ignores the purposes of the first amendment protections, grounded not in hostility but in respect for religion. The premise of these first amendment protections, as the Supreme Court held in 1948 in *McCollum* v. *Board of Education,* is that "both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."

Today, this purpose can best be understood by subjecting the proposed amendment to the Supreme Court's tripartite establishment clause test. What will become evident are the inevitable dangers of intertwining religion and government.

The legislation today contravenes all three prongs. It does not reflect a clearly secular legislative purpose; its primary effect will be to advance religion, and it excessively entangles the Government with religion.

First and foremost, the purpose of this amendment is concededly religious and thus, unconstitutional. The second section, couched in secular terms such as an "equal access" open forum policy, has a clear religious purpose. As Secretary of Education Terrell H. Bell stated in his testimony before the Subcommittee on the Constitution—and I quote—"The 'equal access' concept would serve to restore voluntary religious activity to an equal status with other extracurricular activities permitted on public school premises." This testimony makes clear the religious purpose of "equal access" policy.

Under the "equal access" section of the proposed amendment, all types of religious activity would be permitted in the public schools—beyond the silent prayer or meditation of section 1 of the amendment—including singing hymns, liturgy, Bible readings and proselytization. Thus, the purpose of this amendment is to bring prayer and Bible instruction into the public schools, an objective that, since 1948, has been found unconstitutional.

Second, the effect of this amendment would be to impermissibly advance religion. Prayers and Bible readings in public schools confer the imprimatur of State approval on religious practices. For young and impressionable public school students, the mere presence of prayers and religious activities in the public schools shows Government approval of religious exercises and has the effect of promoting religion. Moreover, the fact that the silent prayer or Bible clubs would be voluntary is of no significance. The voluntariness of student participation fails to diminish the effect of the appearance of Government sponsorship of these activities when they take place in the public schools. Further, it is an abstraction to speak of voluntariness at the public school level. What are students to do if they do not wish to participate in these exercises? Should the burden of distinguishing him or herself as nonreligious fall upon a student attending a public school?

Further indication of this proposed amendment's unconstitutionality is the entanglement it would entail of government and religion. The State is entangled because the prayers will occur in public school facilities. But the State sanction here is not just a matter of light and heat. The State is further entangled through the use of the State's compulsory public school machinery. Under State law, children are obliged to be in school. When religious activities take place in school, it is State law which mandates that students be in the religious environment.

More entanglement occurs through the inevitable participation of schoolteachers and other school officials in these exercises. At a minimum, the State has a duty to supervise its students while on school premises. Thus, school officials must take attendance at the voluntary religious activities and supervise them to make sure that students are safe.

Here, however, there is even more potential for entanglement because teachers and school officials may not play a neutral role in their supervision of these activities.

Section 1 of this proposed amendment does not restrict itself to student silent prayer or meditation. It speaks, rather, of persons. Under this amendment, teachers and school officials have a right to worship during the schoolday. Thus, under this amendment, during the schoolday, the entire school, including all teachers and the principal, could pray together in unison, and this would be deemed constitutional. This involvement of State employees in religious activities constitutes fatal entanglement under the establishment clause and is impermissible.

Teacher supervision of athletics is an entirely different matter. Athletics are not a matter of faith—thus, school participation by school authorities in such clubs does not provide a stamp of government approval.

Thus, the proposed amendment unconstitutionally creates an establishment of religion. The compelling government interest here in preventing such an establishment vitiates any so-called free speech interests.

As to the free exercise claim, which maintains that failure to pass this amendment permitting voluntary prayer would constitute prohibition of the free exercise of religion, this claim is a specious one.

The free exercise clause in no way mandates the proposed amendment at issue today. Under the free exercise clause, the school is obliged to provide religious facilities only if its failure to do so would foreclose a person's practice of religion. Here, there is no problem with students being foreclosed. They are in school several hours a day, 5 days a week, 9 months of the year. All remaining time is available to students to pursue religious activities at places other than State-supported schools.

As to those who would distinguish meditation from other forms of prayer, this distinction is a hollow one. A fixed period of silence, always at the same time, with the teacher presiding, bears the hallmark of a religious ritual. Indeed, for various religions, such as the Quakers, a moment of silence is the major component of religious exercises. For virtually all religions, including Judaism, it also plays a significant portion of the liturgy.

For these reasons, this amendment, which provides for religious worship in the schools, cannot stand. Notions of equal access gloss over the special concern of our Founding Fathers with religious freedom. This special treatment of religion in the eyes of the law is no act of discrimination. It is an indication of an historic national priority.

Thank you.

Mr. SCOTCH. Thank you very much.

[The following was received for the record:]

PREPARED STATEMENT OF RUTI G. TEITEL

Mr. Chairman and members of the Committee:

My name is Ruti G. Teitel. I am the Assistant Director of the Legal Affairs Department of the Anti-Defamation League. During my tenure with the ADL, I have written and lectured on the subject of church-state relations, as well as co-authored various amicus briefs in the federal courts and the United States Supreme Court in civil liberties matters, including May v. Cooperman concerning the New Jersey "moment of silence" statute and Donnelly v. Lynch concerning the constitutionality of a nativity scene in Pawtucket, Rhode Island.

Two decades ago, the Supreme Court of the United States held that prayer and Bible readings in the schools are unconstitutional. Today, by this proposed amendment which relates to permitting voluntary prayer and meditation in the public schools, this body seeks to overturn those decisions. Moreover, it seeks sub silentio to repeal the Establishment Clause of the First Amendment.

The Anti-Defamation League, on whose behalf I appear today, opposes this amendment. Since 1913, when it was founded, the Anti-Defamation League has been committed to protecting religious freedoms in this country, just as did our Founding Fathers, by maintaining a wall of separation between church and state. We have evidenced this continuing concern by our amicus curiae participation in such seminal Supreme Court cases as Abington v. Schempp, 374 U.S. 203 (1963) which disallowed as unconstitutional, Bible reading and prayer recitation in public schools; Lemon v. Kurtzman, 403 U.S. 602 (1971) which held unconstitutional state aid to private religious schools; and by testimony before the Congress and state legislative committees.

The instant proposal, we submit, threatens our protected religious liberties. The amendment before us today seeks to make equal what is not equal. In the name of "equal access," it proposes to allow prayer and meditation in our public schools and to treat clubs devoted to religious worship, just as those devoted to stamp collecting, classical literature, lacrosse or hockey. There is something disingenuous in all of this.

Religion in America's political system has never been treated equally with secular activities. It is precisely because of the special nature of religion that the Founding Fathers distinguished religion, by making particular provisions for religion in the Constitution through the First Amendment's Establishment and Free Exercise Clauses. These provisions stating that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," are concerned with demarcating the place of religion and government in our society -- a chief concern of the founders of this country, because of the historical alignment of government with religion in Europe which resulted in persecution of minorities and in the resettlement in the New World. The central purpose, then, of the Establishment Clause providing that Congress shall make no law respecting an establishment of religion, as noted by the Supreme Court in 1962, "rested on the belief that a union of government and religion tends to destroy government and to degrade religion." Engel v. Vitale, 370 U.S. 421, 431 (1962). It is because of the more than equal, first class status of religion in our system that we have these special constitutional protections. As Madison wrote, it is because "religion is too personal, too sacred, too holy." Memorial and Remonstrances against Religious Assessments, II Writings of Madison, at 187.

When the Supreme Court of the United States interpreted the Establishment Clause to bar prayer in the schools, the Court specifically addressed the discrimination or inequality argument raised by this committee today. As to those who "argue[d] that to apply the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public schools is to indicate a hostility toward religion or toward prayer," the Court declared: "[n]othing, of course, could be more wrong." Engel v. Vitale, 370 U.S. 421, 433-434 (1962). "It is neither sacrilegious nor anti-religious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance." Engel v. Vitale, 370 U.S. 421, 435 (1962).

This thought -- that something so personal and sacred as religion should not be in the public schools but rather at home or in places of worship — is labelled by some proponents of this amendment as hostile to religion and as "Soviet" in nature.

This notion is misbegotten. It ignores the purposes of the First Amendment protections -- grounded not in hostility but in respect for religion. The premise of these First Amendment protections, as the Supreme Court held in 1948, is that "both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." McCollum v. Board of Education, 333 U.S. 203, 212 (1948).

Today, this purpose can best be understood by subjecting the proposed amendment to the Supreme Court's tripartite Establishment Clause test. What will become evident are the inevitable dangers of intertwining religion and government (or public) run schools -- dangers which impermissibly violate the Establishment Clause as it has been read for close to 40 years.

Today's legislation contravenes all three prongs of the Establishment Clause test: it does not reflect a clearly secular legislative purpose, its primary effect is to advance religion and it excessively entangles the government with religion.

First and foremost, the purpose of this proposed amendment is concededly religious and, thus, unconstitutional. The first section of this amendment specifically provides for allowing silent prayer or meditation either individually or in groups in the public schools. The second section, couched in secular terms such as "equal access" open forum policy, has a clear religious purpose. As Secretary of Education Terrell H. Bell stated in his testimony before the Subcommittee on the Constitution on behalf of the Administration's proposed constitutional amendment on voluntary prayer:

> the 'Equal Access' concept would serve to restore voluntary religious activity to an equal status with other extracurricular activities permitted on public school premises.

This testimony makes clear the religious purpose of "equal access" policy; it is not an equal protection clause for extracurricular activities. Under the "equal access" section of the proposed amendment, all types of religious activity would be permitted -- beyond the silent prayer or meditation of section 1 of the amendment, including a variety of religious activities such as singing hymns, liturgy, Bible readings and proselytization.

Thus, this amendment openly seeks to bring prayer and Bible instruction into the public schools. Since 1948, this objective has been ruled unconstitutional. In McCollum v. Board of Education, the Supreme Court considered a voluntary religious instruction program -- which offered study of all faiths in the public schools. In that case the Court found that "a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects. . . ." 333 U.S. at 211. For almost forty years since that decision, the Supreme Court has steadfastly found that prayers or Bible instruction in the public schools reflect a religious purpose and, thus, violate the Establishment Clause.

Second, the effect of this amendment would be to impermissibly advance religion. Prayers and Bible readings in public schools confer the imprimatur of state approval on religious practices. As the Supreme Court noted in Widmar v. Vincent, 454 U.S. 263 (1981), a recent case concerning Bible clubs on university campuses, in contrast to university students, the youth and impressionability of public school students prevents them from appreciating the supposed neutrality of a school's open forum policy. Widmar v. Vincent, 454 U.S. at 276. For public school students, the mere presence of prayers and religious activities in government-run schools shows government approval of religious exercises. Therefore, because the public school setting combines a captive impressionable audience with a government-controlled environment, review of religious practices in the public schools must be stringent. Due to this special concern for the religious neutrality of the school system, many religious activities occuring in educational facilities during school hours have been found unconstitutional. These unlawful practices include the posting of the Ten Commandments in public school classrooms, Stone v. Graham, 449 U.S. 39 (1980); religious instruction in public school facilities, McCollum v. Board of Education, 333 U.S. 203 (1948) and recitation of student led prayer, Karen B. v. Treen, 653 F. 2d 897 (5th Cir., 1981), aff'd, 455 U.S. 913 (1982). In all of these cases, the presence of religious activities in the public school setting had the effect of promoting religion.

Moreover, the fact that the silent prayer or Bible clubs allowed by the proposed amendment would be voluntary is of no significance. The voluntariness of prayer recitation and excusal provisions from Bible study clubs have not cured their unconstitutionality under the Establishment Clause. Decision after decision show the irrelevance of student voluntariness as concerns religious practices in the public schools. Whether the activity concerned voluntary student attendance at religious instruction classes geared to all faiths, McCollum v. Board of Education, 333 U.S. 203 (1948) the voluntary reading of Bible verses by students, Abington v. Schempp, 374 U.S. 203 (1963) or voluntary student-initiated prayer at the beginning of the school day, Karen B. v. Treen, 653 F. 2d 897 (5th Cir., 1981), aff'd, 455 U.S. 913 (1982), all have been found to unconstitutionally advance religion, in the public schools, despite the voluntary nature of the activity. The voluntariness of student participation fails to diminish the effect of the appearance of government sponsorship of these religious activities when they take place in the public schools. Moreover, it is an abstraction to speak of voluntariness at the public school level. What are students to do if they do not wish to participate in these exercises? Should the burden of distinguishing his or herself as nonreligious fall upon a student attending a government school?

Further indication of this proposed amendment's unconstitutionality is the excessive entanglement it would require of government in religion.

Here the state is entangled because the prayers and other religious activities will occur in public school facilities. As found by the Supreme Court in McCollum v. Illinois, the state is entangled simply through the use of tax-supported public school buildings. When religious exercises take place in state run school buildings, they are considered to be under the authority of local school officials.

The state is further entangled through use of the state's compulsory public school machinery. 333 U.S. at 212. Under state law, children are obliged to be in school. When religious activities take place in school, it is state law which mandates students to be in that religious environment. More entanglement occurs through the inevitable participation of school teachers and other state officials in these exercises. At a minimum, the state has a duty to supervise its students while on school premises. Thus, school officials must take attendance at the voluntary religious activities and supervise them to make sure students are safe. See Lubbock v. Lubbock, 669 F. 2d 1038 (5th Cir. 1982), cert. denied, 51 U.S.L.W. 3533 (Jan. 17, 1983) (unconstitutionality of school policy permitting students to gather before or after regular school hours for religious purposes); Brandon v. Board of Education, 635 F. 2d 971 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981) (voluntary school prayer meeting on high school grounds held unconstitutional). As noted by the Supreme Court in its consideration of aid to religious schools in Lemon v. Kurtzman, the very restriction and surveillance necessary to assure that teachers play a neutral role in these activities gives rise to entanglements between church and state. 403 U.S. 602, 620-621 (1971). Here, however, there is even more potential for entanglement because teachers and school officials need not play a neutral role in their supervision of these religious activities. Because section 1 of this proposed amendment does not restrict itself to student silent prayer or meditation but speaks, rather, of "persons," under this amendment, teachers and school officials too, would have rights to worship during the school day. Thus, under this amendment, during the school day the entire school, including all teachers and the principal, could pray together in unison and this would be deemed constitutional. This involvement of state employees in religious activities constitutes fatal entanglement under the Establishment Clause. Teacher supervision of or participation in religious activities is entirely different than such supervision of or participation in an athletic event. Athletics are not a matter of faith — thus, school authority participation in such clubs does not provide a stamp of government approval. In contrast, as recognized in the Establishment Clause, government support of religion produces a different, impermissible result.

Thus, this proposed amendment unconstitutionally creates an establishment of religion. The compelling government interest in preventing such an establishment vitiates any so-called free speech interests here. Unlike the situations in Widmar v. Vincent, 454 U.S. 263 (1981) or Tinker v. Des Moines, 393 U.S. 503 (1969) where there were free speech concerns and no establishment concern was found, here we have a clear countervailing Establishment Clause interest, a fatal defect of this proposed amendment.

As to the Free Exercise claim, concerning this proposed amendment, which maintains that failure to pass this amendment permitting voluntary prayer or meditation would constitute prohibition of the free exercise of religion, it is clear that this claim is a specious one. The Free Exercise Clause in no way mandates the proposed amendment at issue today. Under the First Amendment's Free Exercise Clause, a school is obliged to provide religious facilities only if its failure to do so would effectively foreclose a person's practice of religion. Here, there is no problem with students being foreclosed from practicing religion. Students attend school several hours a day, five days a week, nine months out of the year. All the remaining time is available to students for their participation in religious activities at places other than state supported schools. See Lubbock v. Lubbock, 669 F. 2d 1038, 1048 (5th Cir. 1982), cert. denied, 51 U.S.L.W. 3533 (Jan. 17, 1983).

As to those who would distinguish the meditation or silent prayer permitted by this proposed amendment from other forms of prayer, it is clear that this distinction is a hollow one and that meditation and silent prayer constitute religious worship. A fixed period of silence, always at the same time with a teacher presiding bears the hallmark of a religious ritual. The only other instance one can point to where a group of children would be standing or sitting in silence at a fixed time with a leader would be in their respective churches or synagogues. Indeed, for various religions such as the Quakers, a "moment of silence" is the major component of their religious exercises. For virtually all religions, including Judaism, a "moment of silence" is at least a significant portion of the prescribed liturgy. The fact that this exercise occurs in the public schools during school hours constitutes an unconstitutional establishment of religious activity in our public schools.

For these reasons, as a matter of constitutional law, this amendment which provides for religious worship in the schools cannot stand. Notions of "equal access," while appealing superficially, gloss over the special concern of our Founding Fathers with religous freedom — unencumbered by government approval or disapproval. This special treatment of religion in the eyes of the law is no act of discrimination, it is an indication of an historic national priority.

In the words of Justice Frankfurter:

> The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the state is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart.

McCollum v. Board of Education, 333 U.S. 203, 231 (1948).

Thank you. I will be happy to answer any questions.

Mr. SCOTCH. Ms. Katz.

STATEMENT OF JANICE KATZ

Ms. KATZ. My name is Janice Katz. I am vice chair of the Capital Committee of the National Council of Jewish Women, a volunteer organization of 100,000 women and men, in 200 communities across the United States.

I appreciate the time and the opportunity to offer this testimony here today.

NCJW strongly opposes Senate Joint Resolution 73, which proposes an amendment to the Constitution regarding prayer in public school.

NCJW also opposes the concept of voluntary silent prayer as set forth in the original subcommittee alternative constitutional amendment. It is a fundamental belief of the NCJW that religious liberties and separation of church and state are constitutional principles which must be preserved in a democratic society.

NCJW has consistently opposed officially sanctioned prayer, even so-called voluntary prayer, in public schools. Permitting an essentially religious practice in secular schools by stating that: "Nothing in the Constitution shall be construed as prohibiting it" is a direct violation in blatant denial of the first amendment guarantee of separation of church and state. This fundamental guarantee of freedom of religion and from religion, for those who do not wish to practice it, is a prerequisite of our great democracy. In particular, it is basic to the U.S. public education system.

There seems to be an effort to promote the belief that those who oppose voluntary prayer in schools are against religion and therefore against children praying. As observers of the Jewish faith, NCJW members are committed to the practice of religion and to the solace of prayer. We are, however, convinced that officially sanctioned prayer in the public schools would automatically place children under enormous pressures to conform to the practice, thus negating the voluntary aspect of the amendment that is being proposed.

It is particularly disingenuous for the proponents of this constitutional amendment to attach the phrase that: "no person shall be required to participate in prayer," as it is not this requirement that will be at issue for the schoolchild, but the pressure to conform by participation.

The NCJW believes that prayer should be conducted in the home or the appropriate religious institution and not in the schools. NCJW further believes that no prayer or style of worship is uniformly acceptable to all religious traditions. Even if it is nondenominational, prayer or silent meditation could have a religious connotation. Since individual silent meditation is already permitted, and voluntary prayer on an individual basis is not denied, what is the purpose of altering the Constitution? Would this not put a stamp of conformity on individuals in a pluralistic society?

Let us not create a situation which divides our children by providing an atmosphere which exacerbates religious tensions. Instead, our elected representatives should concentrate more of their energy on strengthening our troubled public education system. Improving the emphasis on quality education rather than undermining the first amendment to the Constitution by violating the principle of church-state separation would better serve the needs of the American people at this time.

The National Council of Jewish Women, therefore, urges Senate defeat of any proposal which would amend the Constitution to permit organized prayer or meditation of any kind in the public schools of this country.

Thank you.

Mr. SCOTCH. Thank you all very much.

[The following was received for the record:]

PREPARED STATEMENT OF ESTHER PRYOR, CHAIRWOMAN OF THE CAPITAL COMMITTEE, NATIONAL COUNCIL OF JEWISH WOMEN

My name is Esther Pryor. I am Chairwoman of the Capital Committee of the National Council of Jewish Women, a volunteer organization of 100,000 women and men in 200 communities in the United States. I appreciate the opportunity to offer this testimony.

NCJW strongly opposes S.J. Res. 73 which proposes an amendment to the Constitution regarding prayer in public schools.

It is a fundamental belief of the NCJW that religious liberties and separation of church and state are Constitutional principles which must be preserved in a democratic society. NCJW has consistantly opposed officially sanctioned prayer, even so-called voluntary prayer, in public schools. Permitting an essentially religious practice in secular schools by stating that "nothing in the Constitution shall be construed as prohibiting" it is a direct violation and blatant denial of the First Amendment guarantee of separation of church and state. This fundamental guarantee of freedom of religion (and from religion for those who do not wish to practice one) is a prerequisite of our great democracy. In particular, it is basic to the United States' public education system.

There seems to be an effort to promote the belief that those who oppose "voluntary" prayer in schools are against religion and, therefore, against children praying. As observers of the Jewish faith, NCJW members are committed to the practice of religion and to the solace of prayer. We are, however, convinced that officially sanctioned prayer in the public schools would automatically place children under enormous pressure to conform to the practice, thus negating the "voluntary" aspect of the amendment that is being proposed.

It is particularly disingenuous for proponents of this Constitutional amendment to attach the phrase that "no person shall be required...to participate in prayer", as it is not this requirement that will be at issue for the school child, but the pressure to conform by participation.

NCJW believes that prayer should be conducted in the home or the appropriate religious institution and not in the schools. NCJW further believes that no prayer or style of worship is uniformly acceptable to all religious traditions. Even if it is non-denominational, prayer or silent meditation could have a religious connotation. Since individual silent meditation is already permitted and "voluntary" prayer on an individual basis is not denied, what is the purpose of altering the Constitution? Would this not put a stamp of conformity on individuals in a pluralistic society?

Let us not create a situation which divides our children by providing an atmosphere which exacerbates religious tensions. Instead it would behoove our elected representatives to concentrate more of their energy on strengthening our troubled public school education systems. Improving the emphasis on quality education, rather than undermining the First Amendment to the Constitution by violating the principle of church/state separation, would better serve the needs of America's young people.

The National Council of Jewish Women, therefore, urges Senate defeat of any proposal which would amend the Constitution to permit organized prayer or meditation of any kind in the public schools.

Thank you.

Mr. SCOTCH. The last panel will consist of two organizations. I understand that Americans for Democratic Action's representative had to go because of the lateness of the hour. Their statement will be included in the record as if presented, and the last witnesses today are the Seventh Day Adventists and the B'nai B'rith International. If representatives from those groups would kindly come forward, you will be heard.

[The following was received for the record:]

TESTIMONY OF
LEON SHULL
NATIONAL DIRECTOR
AMERICANS FOR DEMOCRATIC ACTION
BEFORE THE
SENATE JUDICIARY COMMITTEE
ON
SCHOOL PRAYER
JUNE 27, 1983

My name is Leon Shull, I am the National Director of Americans for Democratic Action, a national public-policy organization with members in every state.

I want to thank the committee for giving me the opportunity to testify today. The question of whether prayer should be required in public schools is difficult to deal with because of the emotional atmosphere of the debate. Supporters of school prayer tend to label opponents as anti-religion or even godless. Such statements are distorted and misleading; they are also irrelevant. Religion unquestionably holds an important place in our society, but that place is clearly not in a federally-funded public school system. In writing for the first Supreme Court decision in 1962, Justice Black stated: "It is neither sacrilegious nor anti-religious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance."

The fundamental issue is constitutional. Prayer in the school -- voluntary or otherwise -- violates the First Amendment by definition. In at least a dozen decisions from 1947 to 1982, the United States Supreme Court banned governmental assistance to religion and specifically outlawed prayers and Bible reading in the schools. The advocates of the prayer amendment must logically reject the basic premise underlying these Supreme Court decisions; they must attack the delicate balance which the court has constructed between the establishment and the free exercise clauses of the First Amendment. Father Robert F. Drinan, who is president of Americans for Democratic Action, a former Member of Congress, and (of particular relevance to this issue) a Catholic priest, has summed up the principles at stake: "The advocates of school prayer are in effect asking the Congress and the country to overthrow the philosophical, juridical, and constitutional synthesis which the court has evolved over a period of about two generations. The prayer amendment, in other words, is not a simple modification of the Church-State detente evolved by the Supreme Court; it is in effect a repudiation of it."

To say that the state is not promoting religion because prayer is "voluntary" or "silent meditation" is a semantical dodge. Public school teachers, principals, or school officials, who are all sanctioned by the government, are directing and conducting the prayer or the meditation. Authorizing such government-employed officials to determine what constitutes a non-denominational prayer is, in effect, giving the government authority in religious matters. The fact that all children are required by law to attend school reinforces the notion of government sponsorship of religion. This directly contravenes the Supreme Court's ruling that the government, either through its legislature or school officials, must not initiate, promote, or sponsor religious activities in the public schools. The prayer is taking place on school property, which is supported by the taxpayers. Allowing the student who does not wish to participate to leave the room is not protecting his or her freedom, but is rather excluding that individual from the classroom because of state-sanctioned religious activity; it is forcing that student into the role of outcast.

Subtle pressure, whether purposeful or not, from the teacher and from the student's peers is not in any way conducive to the free practice of religion. To speak of a 6 or 7 year old, or for that matter, a 13 or 14 year old child exercising his or her constitutional rights in such an atmosphere is absurd. There is no question that teachers, who are required to conduct the prayers, are authority figures. Their attitudes, whether positive or negative, towards the prayer will certainly affect impressionable children.

Offering to create a non-denominational prayer is not the answer. First, who would decide what that prayer will be? The government? Certainly that is an instrusion into a sphere where the government has no place. Writing for the Court, Justice Black concluded that the First Amendment "at least" means that "it is no part of the business of government to compose official prayers for any group of the American people." Second, such a prayer is offensive to those parents who do not wish to bring up their children with any religious beliefs, and it is offensive to the intensely religious practitioners for whom prayer is a sacred activity accompanied by certain practices or words. As the National Council of Churches has pointed out in previous testimony, orthodox Jews pray in a specific posture with prayer shawls and head coverings, while devout Christians would find a prayer that did not include the name of Jesus Christ unacceptable.

It is for this reason that many religious groups and leaders oppose school prayer -- they object to the secularization of prayer and the dilution of its significance.

A prayer amendment tends to assume the nature of a "quick fix" for the perceived godlessness and secularism of the public schools. But, at best, a prayer is a minute or two a day in the 30 hours of instruction per week in the average public school. Much more significant and meaningful would be the sort of courses about religion approved by the American Association of School Administrators (AASA) and by all educational and civil liberties groups. These courses would teach about various religions, such as Judaism, Christianity, Hinduism, Buddhism, instead of trying to provide ersatz spiritual leadership. The courses would seek to eradicate religious illiteracy by elevating objective knowledge about religion to a point of academic respectability. Courses of this nature do not raise any constitutional questions. Such instruction could be given for students who elect it and possibly for others. It would be infinitely more significant and substantive than a moment of prayer. And it would be legally non-controversial, academically sound, and religiously beneficial.

In the 1952 Zorach vs. Clausen decision, the Supreme Court permitted released-time religious education so long as it is conducted off the school premises. For those sincere persons who desire to integrate the secular knowledge transmitted in the public schools more closely with the sacred, there is a way through released-time that is constitutionally permissible and organizationally feasible.

I find it ironic that an administration which is always promising to remove excessive government interference from the lives of its citizens is now trying to impose itself in one of the most sacred and personal areas of an individual's life. And it is doing so in the face of a specific constitutional prohibition and very clear and consistent Supreme Court rulings.

I hope that this committee will oppose any such efforts to weaken the Constitution and the Court, and to curtail one of our most basic rights.

# # #

Mr. SCOTCH. Sir, if you could kindly introduce yourself, we will ask you to go first.

STATEMENT OF A PANEL, INCLUDING GORDON O. ENGEN, DIRECTOR FOR NORTH AMERICA, DEPARTMENT OF PUBLIC AFFAIRS AND RELIGIOUS LIBERTY, GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS; AND LEONARD STEINHORN, ON BEHALF OF INTERNATIONAL COUNCIL OF B'NAI B'RITH

Mr. ENGEN. I am Gordon Engen, a clergyman, and director of the Department of Public Affairs and Religious Liberty for the North American Division of the Seventh-Day Adventist Church.

The Seventh-Day Adventist Church, with 600,000 adult members in North America, and a worldwide membership of about 4 million, are interested in and seek to promote the vitality of religion and the quality of religion in prayer in America.

Under the proposed amendments, the Government is also interested in doing much the same.

A constitutional amendment of this magnitude deserves the most diligent attention, the greatest respect, and the most careful scheduling of the widest participation in a hearing such as this.

Our Constitution approaches religion differently from that of any other country. Our forefathers rejected the notion of a benevolent government granting religious liberty to its citizens. Instead, they insisted that these rights were God-given. Therefore, to the government, they said in essence, "Abstain from becoming involved with religion, doing nothing that would establish it or restrict its practice."

Every time well-meaning people attempt to tinker with this uniquely conceived document, we watch with concern. When amendments are proposed with religious overtones, we become alarmed. When amendments are suggested that might alter the interpretation of the first amendment, we jump into action. This is not to fault the amendment procedure per se, of course, although we would hope that such a procedure never entails the convening of a constitutional convention which could have even a remote possibility of tampering with the first amendment. The amendment procedure must never degenerate into a popularity contest based upon public opinion polls.

Minority rights are protected by the Bill of Rights, regardless of the majority vote.

During its present term alone, the Supreme Court has been asked to review more than 40 cases involving some aspect of the free exercise clause and the establishment clause of the first amendment. And over the years, the high Court has developed through case law an interpretation and application of the first amendment that holds government at bay from involvement in religion and that keeps religion from getting its foot into the door of government.

We see any proposed religious constitutional amendment, including the ones under consideration here, as potentially upsetting to past applications of the first amendment. Even Mr. Schmults in his testimony today said there was no way to predict what direction the Supreme Court might go.

For example, could we rely on former Supreme Court decisions of tension developed between the first amendment and a new amendment? For the first time in our Nation's history, the Government would be thrust by constitutional amendment into the role of establishing religious practices by allowing them to become part of the function of a public institution. Any religious amendment, no matter how innocuous, would create tension to a greater or lesser degree. We do not believe that our Nation should take this risk.

In fact, we applaud the motives of those who sponsor such amendments and have very similar motives ourselves. But when well-intentioned people place the force of the Constitution behind their zeal, we strongly object. It alarms us to contemplate religion taking an official place in public institutions, as if a form of godliness would please God and cure all of the social ills.

When the constitutional waters are muddied by the enactment of a religious amendment, the efforts to extend religion further into public institutions will inevitably result. Opposition to a religious amendment is not a vote against God. Jesus said his kingdom was not of this world. He wishes to establish his kingdom in the hearts and lives of his followers. Legislative enactments, constitutional amendments, or pronouncements through public resolutions of government are not God's plan.

Nothing so drastic as a constitutional amendment is called for. It is not the Constitution that needs to be changed, even in its religious aspects. We accept the interpretation by the Supreme Court in the *Engel* v. *Vitale* decision, that did not outlaw true personal voluntary prayer. What needs to be corrected are some of the excesses that were committed in the wake of the interpretation of this decision. This could be corrected quickly through simple majority legislation.

Legislative action that is subject to judicial review is preferable in safeguarding the free exercise of religion to an amendment to the Constitution which could bring the whole matter of the first amendment and its application through case law into question.

For the above reasons, we urge you to oppose this and any other religious constitutional amendment. Do not through such means cloud the future of church-state separation.

Thank you.

Mr. SCOTCH. Thank you very much.

[The following was received for the record:]

PREPARED STATEMENT OF GORDON O. ENGEN

Mr. Chairman; members of the committee. I am Gordon Engen, director of the department of Public Affairs and Religious Liberty for the North American Division of the Seventh-day Adventist Church.

The Seventh-day Adventist Church, whose headquarters are located here in Washington, D.C., seeks to guard the vitality of religion in America. Numbering over 600,000 adult members in the United States and nearly four million world-wide, Seventh-day Adventists are anxious to defend the freedom of religious assembly and the sacred right of all to pray as conscience dictates. But we wish not only to protect the right to pray and engage in religious assembly; we are concerned equally with the quality of such activity.

The Constitution of the United States approaches religion differently from that of any other country. Our forefathers rejected the notion of a benevolent government granting religious liberty to its citizens. Instead, they insisted that these rights were *God* given. Therefore, to the government they said (paraphrasing): "Abstain from involvement with religion, doing nothing that would establish it or restrict its practice."

Every time well meaning people attempt to tinker with this uniquely conceived document we watch with concern. When amendments are proposed with religious overtones we become alarmed. And when amendments are suggested that might alter the interpretation of the first amendment, we jump into action. This is not to fault the amendment procedure per se, of course, although we would hope that such a procedure never entails the convening of a constitutional convention which could have even a remote possibility of tampering with the first amendment. The amendment procedure serves well—and may have been intended to serve—the periodic need of clarifying and correcting governmental relationships, whether between the branches of the Federal Government or between the Federal Government and the several States. The amendment procedure must never degenerate into a popularity contest based on public opinion polls. Minority rights are protected by the Bill of Rights regardless of a majority vote.

Since 1868 our courts have been directed to apply the Constitution to conflicts of everyday life all the way from enactments by city councils to the actions of the Federal Government. During its present term alone, the Supreme Court has been asked to review more than 40 cases involving some aspect of the free exercise clause or the establishment clause of the first amendment.

Over the years the High Court has developed through case law an interpretation and application of the first amendment that holds government at bay from involvement in religion and that keeps religion from getting its foot into the door of government.

We see any proposed religious constitutional amendment, including the ones under consideration here, as potentially upsetting to past applications of the first amendment. Even Mr. Schmultzin his testimony said there was no way to predict what direction the Supreme Court would go in the future.

For example, could we rely on former Supreme Court decision if tension developed between the first amendment and a new religious amendment? For the first time in our Nation's history the Government would be thrust by constitutional amendment into the role of "establishing" religious practices by allowing them to become part of the function of a public institution. Any religious amendment, no matter how innocuous, would create tension to a greater or lesser degree. We do not believe our nation should take that risk.

I do not impugn the motives of those who are sponsoring this amendment. In fact, I applaud those motives as wholesome and highminded. As a clergyman, I welcome greater participation in religious activity through silent or audible prayer, or through gatherings of those of kindred faith. Seventh-day Adventist ministers and lay workers throughout the Nation are striving for these same objectives with evangelistic zeal. But this activity belongs in the churches of our communities and in the lives of private citizens as self employed or even as employees at some level of government. Religious commitment makes better workers and better public servants. But when well intentioned people place the force of the Constitution behind their zeal, we strongly object. It alarms us to contemplate religion taking an official place in public institutions, as if a form of godliness would please God and cure our social ills.

With the constitutional waters muddied by enactment of a religious amendment, however acceptable its content, the efforts to extend religion further into public insitutions might escalate. We deduce this from what the zealots now say, things like "Make this a Christian nation," and "bring our country back to God by enacting laws regarding prayer or a national day of worship."

Let men and women of high religious moral principles become involved in government on all levels. Let them make decisions based on their high ideals and principles. But let them not seek to mix the matters of Caesar with the matters of God by making the latter a function of government.

Opposition to a religious amendment is not a vote against God. Jesus said His Kindgom was not of this world. He wishes to establish His Kingdom in the hearts and lives of His follows. Legislative enactments, constitutional amendments, or pronouncements through public resolutions of government are not God's plan.

Nothing so drastic as a constitutional amendment is called for. It is not the Constitution that needs to be changed even in its religious aspects. We accept its interpretation by the Supreme Court in *Engel* v. *Vitale* that did not outlaw true personal voluntary prayer. What needs to be corrected is the excess that was committed in the wake of this interpretation. And this could be corrected quickly through simple-majority legislation.

Legislative action that is subject to judicial review is preferable in safeguarding the free exercise of religious to an amendment to the Constitution which could bring the whole matter of the first amendment and its application through case law into question. But even here, efforts to strip the courts of jurisdiction in the area of prayer through simple-majority bills would evoke our opposition.

For the above reasons we urge you to oppose this and any other religious constitutional amendment. Do not through such means cloud the future of church-state separation.

Mr. SCOTCH. Mr. Steinhorn.

STATEMENT OF LEONARD STEINHORN

Mr. STEINHORN. Thank you for having us here this afternoon. My name is Leonard Steinhorn, assistant to the director of the International Council of B'nai B'rith.

B'nai B'rith is the oldest and largest Jewish organization in the world. Our philosophy is based on a fervent belief in democratic pluralism and a vigorous defense of the rights of minorities. As Jews, we are well aware of what happens when these rights are violated, and it is on this point that I will base my testimony on the school prayer issue.

I would like to speak first on Senate Joint Resolution 73, the organized voluntary prayer resolution supported by the Reagan administration; second, on the silent prayer provision of the Hatch amendment; and third, on the equal access provision of the Hatch amendment.

OPPOSING VOLUNTARY PRAYER

We at B'nai B'rith are gravely concerned over the consequences of Senate Joint Resolution 73, the organized voluntary prayer amendment. We feel that it strikes at the very heart of our Constitution and our democratic, pluralistic society.

Let us assume that this bill becomes law. Who will decide on the content of the prayer? Will it be the local rabbi or preacher, the school principal, or even the Governor? Does any one of them have the right and authority to give expression to every child's most personal beliefs? And is it possible to develop a prayer that will not offend a particular religious minority?

At B'nai B'rith, we fear that this proposed amendment will have the effect of violating the rights of religious minorities. This is a serious violation in light of the fact that our Nation was founded to protect the various minorities that fled from tyranny in Europe.

We do understand the sincere motive behind this proposed amendment, but in the name of attempting to inculcate morality through prayer, don't we run the risk of establishing in the schools a form of secular religion? And wouldn't this be in direct contradiction to the establishment clause of the first amendment?

As an organization dedicated to Jewish culture, B'nai B'rith obviously affirms the role of religion in American society, but we are confident that religion and prayer have a home in institutions other than the public schools.

There is one final point concerning the organized voluntary prayer amendment. That has to do with the children who choose not to participate in the prayer. Indeed, voluntary prayer has the potential of making children of religious minorities involuntary outsiders. It can also have the effect of forcing these schoolchildren to doubt their own, different, beliefs. Such children do not, simply, need such pressures, especially when they are condoned by the State.

OPPOSING SILENT PRAYER

As for Senator Hatch's amendment, we find silent prayer no less threatening to our pluralistic society than we do organized voluntary prayer. This silent prayer amendment is an attempt to get around the obvious problems with Senate Joint Resolution 73, but the distinctions are spurious.

It is important to preface my remarks on silent prayer by noting that as a Jewish organization, B'nai B'rith obviously believes in the efficacy of prayer. But to believe that prayer is effective is not the same as wanting it in the public schools. For, we recognize that not all Americans are religious; not all believe that prayer of any sort will have an effect on our Nation's or children's morality. So by legalizing silent prayer, we again run the risk of violating the rights of religious minorities by establishing implicitly a secular religion. It is not, indeed, the State's role to legitimize any form of worship or to impose it on its citizens. Silent prayer, then, stands in fundamental contradiction to the establishment clause and to the principles of religious freedom.

Furthermore, children who choose not to participate in the moment of silence face the same social ostracism as those who would not recite the organized prayer under Senate Joint Resolution 73. Any form of prayer in the schools could force a nonbeliever, who has every right not to believe, to question whether his or her principles are correct. In each case, legalized prayer would separate, rather than unify, our schoolchildren, and would constitute an unnecessary intrusion by the State into a child's most private beliefs.

There is another problem with the silent prayer amendment. Silent prayer assumes that schoolchildren express, without guidance or structure, their reverence for a deity. But if there are no directions or guidelines given, how do we know what the students are thinking? With their foot in the door, supporters of organized prayer might then attempt to make sure that they know what children are thinking by once again introducing an organized prayer amendment.

"EQUAL ACCESS": EXCLUSION, NOT UNITY

Finally, we at B'nai B'rith are concerned with the equal access provision of Senator Hatch's proposed amendment. It is generally recognized that any student group that wishes to use school facilities must be approved and advised by school authorities. Under the equal access provision, the same would apply to religious groups, which means that the State would implicitly accept such groups as having a legitimate place in the schools. Again, this violates the establishment clause, but it also creates a situation where the school would condone a club that would not allow minorities to join because of religious belief. Certainly, this would foster exclusion, not unity. It would reinforce bias and discrimination. It would do exactly the opposite of what our Nation is dedicated to, which is the inclusion and acceptance of all our citizens.

To summarize, we at B'nai B'rith support religious expression, but we do not see the public school as the proper place for it. Imposing prayer on schoolchildren can only have the effect of giving the State stamp of approval to the potential exclusion of religious minorities. Isn't it better that we continue to center religious activities in the church, synagogue, home, and family, without any Government intrusion? Haven't these institutions worked well enough for the past 200 years?

Thank you.

Mr. SCOTCH. Thank you.

I believe that concludes the list of witnesses, unless anyone present here has been omitted by inadvertence?

That not being the case, I would like to thank you, all of you particularly in the room who stayed this afternoon despite the mixup and confusion. I think it was very, very important that the record was completed on this most significant proposal for an amendment to the Constitution.

As I indicated earlier, some Senators may want to address questions, not being able to be here, and we are going to leave the record open for 10 days for the questions to be dispatched and answers to be received for those Senators who wish to ask questions.

Again, thank you very much, and this hearing will stand adjourned.

[Whereupon, at 4:48 p.m., the committee was adjourned.]

[The following was received for the record:]

APPENDIX

ADDITIONAL SUBMISSIONS FOR THE RECORD

STATEMENT OF SENATOR ORRIN G. HATCH, UNITED STATES SENATE COMMITTEE ON THE JUDICIARY, EXECUTIVE SESSION ON PROPOSED AMENDMENTS TO THE CONSTITUTION RELATING TO SCHOOL PRAYER, JULY 13, 1983.

MR. CHAIRMAN, WHILE THIS COMMITTEE PROBABLY DEALS WITH MORE DIFFICULT AND MORE DIVISIVE ISSUES THAN ANY OTHER COMMITTEE IN THE SENATE, I HAVE FOUND THE ISSUE OF SCHOOL PRAYER TO BE THE MOST DIFFICULT ONE PERSONALLY WITH WHICH I HAVE EVER DEALT. IT HAS BEEN SO DIFFICULT BECAUSE I BELIEVE IN SCHOOL PRAYER; I BELIEVE IN A CONSTITUTIONAL AMENDMENT ON THIS ISSUE; I BELIEVE THAT THE SUPREME COURT WAS WRONG IN ITS DECISIONS IN ENGEL AND ABINGTON; I BELIEVE THAT THE HISTORIC, SUPPORTIVE RELATIONSHIP BETWEEN THE STATE AND EXPRESSIONS OF RELIGIOUS PRAYER OUGHT TO BE RESTORED.

I BELIEVE IN ALL THIS, YET-- I CANNOT MUSTER ENTHUSIASM FOR THE PROPOSED AMENDMENT OF THE ADMINISTRATION. ALONG WITH THE CHAIRMAN OF THIS COMMITTEE, I INTRODUCED THIS AMENDMENT BY REQUEST-- LAST YEAR AND AGAIN THIS YEAR. I HAVE SPOKEN AND WRITTEN IN SUPPORT OF IT. I HAVE VOTED TO REPORT IT OUT OF SUBCOMMITTEE. YET-- I STILL CANNOT GENERATE WITHIN MYSELF THE FEELING THAT THIS AMENDMENT OUGHT TO, UNEQUIVOCABLY, BECOME PART OF THE CONSTITUTION OF THE UNITED STATES. INDEED, WHAT PROBABLY CONCERNS ME THE MOST OF ALL, IS THAT THE MORE THAT I ASSESS THIS AMENDMENT, THE MORE THAT I ACTUALLY ATTEMPT TO ASSESS ITS REAL-WORLD IMPACT, THE LESS ENTHUSIASM THAT I HAVE FOR IT. AS I HAVE SAT THROUGH DAYS OF HEARINGS AND STU-

DIED PREPARED STATEMENTS AND ANALYSES, AS I HAVE SPOKEN TO INDIVIDUALS WHOSE JUDGEMENT I RESPECT ON THESE MATTERS, AND WHOSE SENSE OF PERSONAL SPIRITUALITY CANNOT BE QUESTIONED, I HAVE BECOME LESS CONVINCED OF THE MERITS OF THIS AMENDMENT.

PERHAPS, IT IS MY OWN MEMBERSHIP IN A MINORITY CHURCH THAT HAS OFTEN BEEN SUBJECT TO OFFICIAL HOSTILITY. I CANNOT DENY THAT I HAVE BEEN, LIKE MOST OF US, SHAPED AND INFLUENCED BY MY CHURCH. PERHAPS, IT IS BECAUSE OF THIS PERSONAL HISTORY THAT I SIMPLY CANNOT COME TO ENTHUSIASTIC TERMS WITH THE NOTION OF THE GOVERNMENT OFFICIALLY ENCOURAGING AND SELECTING PRAYERS TO BE DELIVERED BY EVERY STUDENT IN A CLASSROOM--EVERY STUDENT UNLESS SEVERAL WISH TO OFFICIALLY HAVE THEMSELVES EXCUSED BY THE PUBLIC AUTHORITIES, AND WISH TO HAVE THEMSELVES FOREVER CHARACTERIZED AS "DIFFERENT" BY THEIR YOUTHFUL AND GENERALLY IMMATURE PEERS AND COLLEAGUES. I SIMPLY CANNOT COME TO ENTHUSIASTIC TERMS WITH THE STATE, NOT SIMPLY ACCOMODATING PRAYER IN A NEUTRAL MANNER, BUT ACTIVELY AND OFFICIALLY ENCOURAGING A SPECIFIC FORM OF PRAYER.

WHILE PERHAPS I AM ALONE ON THIS ISSUE, I FIND THE PROPOSED ADMINISTRATION AMENDMENT TO S.J.RES. 73 TO BE EVEN MORE OFFENSIVE TO THIS PERSONAL PERSPECTIVE THAN THE UNAMENDED VERSION OF THIS MEASURE. I FIND IT OFFENSIVE BECAUSE IT SEEKS TO PLAY POLITICS WITH THE CONSTITUTION BY PURPORTING TO ESTABLISH A POLICY WITH RESPECT TO OFFICIAL PRAYER THAT IT HAS NO REAL INTENT TO ESTABLISH. IN RESPONSE TO THE CONCERN THAT I AND OTHERS HAVE RAISED ABOUT THE IMPROPRIETY OF THE STATE DRAFTING PRAYERS FOR THE CLASSROOM, THE NEW AMENDMENT WOULD ADD LANGUAGE FORBIDDING THE STATE FROM "COMPOSING" ANY PRAYER. WHAT DOES THAT MEAN? WHAT DOES THAT ADD TO THE AMENDMENT? IT MEANS NOTHING AND IT ADDS NOTHING. IT IS INTENDED TO MEAN NOTHING AND IT IS INTENDED TO ADD NOTHING.

IT IS NOT INTENDED TO ADDRESS THE STATE SELECTING OF PRAYER, THE STATE CHOOSING OF PRAYER, THE STATE MANDATING OF PRAYER, OR THE STATE INFLUENCING OF PRAYER. ALL THAT IT IS INTENDED TO DO IS ADDRESS THE NARROW MECHANICAL OPERATION OF THE STATE COMPOSING OF PRAYER. UNDER THIS PROVISION, THE STATE COULD NOT OFFICIALLY SIT DOWN AT THE DRAFTING TABLE AND COMPOSE AN ENTIRELY NEW PRAYER; IT COULD, HOWEVER, SIT DOWN AT THAT SAME TABLE AND THUMB THROUGH THE BAPTIST PRAYER BOOK OR THE EPISCOPAL PRAYER BOOK OR THE MORMON PRAYER BOOK AND SELECT DIFFERENT PRAYERS FOR DIFFERENT DAYS; IT COULD ACCEPT THE PRAYER OF ANY HELPFUL "VOLUNTEER" WHO COULD PUT TOGETHER THE "RIGHT" LANGUAGE FOR A PRAYER; IT COULD SELECT THE DEVOTIONAL LANGUAGE OF ANY INDIVIDUAL, LIVING OR DEAD, SO LONG AS THE STATE ITSELF DID NOT COMPOSE THE LANGUAGE ITSELF.

APART FROM THE CYNICISM OF ADDRESSING A SERIOUS PROBLEM RAISED IN S.J.RES. 73 WITH SUCH TRANSPARENT "REMEDIAL" LANGUAGE, I BELIEVE THAT THE NEW LANGUAGE MAY INVITE, FAR MORE EXPLICITLY THAN THE ORIGINAL LANGUAGE, THE STATE TO EXERCISE PRECISELY THE AUTHORITIES THAT I HAVE JUST DESCRIBED. THE PRINCIPLE SUBSTANTIVE EFFECT OF THE NEW AMENDMENT IS TO MAKE EXPLICIT IN THE CONSTITUTION STATE AUTHORITY THAT WAS FAR MORE IMPLICIT IN THE ORIGINAL VERSION OF THE AMENDMENT.

MR. CHAIRMAN, WHILE I RESPECT THE ADMIRABLE EFFORTS THAT THE ADMINISTRATION HAS MADE TO FOCUS NATIONAL ATTENTION UPON THE SCHOOL PRAYER ISSUE, AND WHILE I STRONGLY SHARE THEIR CONCERN THAT A CONSTITUTIONAL RESPONSE MUST BE FORTHCOMING FROM CONGRESS, I HAVE RELUCTANTLY AND WITH NO ENTHUSIASM COME TO THE CONCLUSION THAT I CANNOT SUPPORT S.J.RES. 73 IN ITS PRESENT FORM.

STATEMENT OF SENATOR ORRIN G. HATCH, U.S. SENATE SUBCOMMITTEE ON THE CONSTITUTION, EXECUTIVE SESSION ON PROPOSED AMENDMENTS TO THE CONSTITUTION RELATING TO SCHOOL PRAYER, JULY 14, 1963.

MR. CHAIRMAN, THIS MORNING'S EXECUTIVE SESSION FOLLOWS SEVEN DAYS OF HEARINGS BY THIS COMMITTEE ON PROPOSED AMENDMENTS TO THE CONSTITUTION RELATING TO SCHOOL PRAYER. ON JUNE 9, THE SUBCOMMITTEE ON THE CONSTITUTION VOTED TO REPORT TWO AMENDMENTS ON THIS HIGHLY CONTROVERSIAL MATTER-- S.J.RES. 73, OFFERED BY THE ADMINISTRATION, AND S.J.RES. ___, A NEW MEASURE EMERGING FROM THE SUBCOMMITTEE OFFERED BY THE CHAIRMAN AND OTHER MEMBERS OF THE SUBCOMMITTEE. IT IS TO THIS LATTER MEASURE, THE SO-CALLED 'SILENT PRAYER' AMENDMENT THAT I WOULD LIKE TO ADDRESS MY REMARKS.

WHAT THIS PROPOSAL WOULD DO IS TO ALLOW STATES AND LOCALITIES TO PERMIT INDIVIDUAL OR GROUP SILENT PRAYER OR MEDITATION AT THE OUTSET OF THE PUBLIC SCHOOL DAY. IN ADDITION, IT WOULD CLARIFY THAT THERE IS NO CONSTITUTIONAL BARRIER TO LOCAL SCHOOL DISTRICTS ALLOWING VOLUNTARY, EXTRA-CURRICULAR STUDENT ORGANIZATIONS OF A RELIGIOUS CHARACTER FROM USING PUBLIC SCHOOL FACILITIES ON THE SAME BASIS AS SIMILAR ORGANIZATIONS OF A NON-RELIGIOUS CHARACTER. THIS RELATES TO THE SO-CALLED "EQUAL ACCESS" ISSUE.

BECAUSE THIS AMENDMENT REPRESENTS AN EFFORT TO ACHIEVE A CONSENSUS APPROACH ON AN EXTREMELY DIFFICULT AND DIVISIVE ISSUE, IT HAS BEEN THE SUBJECT OF CRITICISM BY A NUMBER OF SINCERE INDIVIDUALS AND ORGANIZATIONS ON BOTH ENDS OF THE POLITICAL SPECTRUM WHO WOULD PREFER DIFFERENT APPROACHES. I RESPECT THEIR JUDGEMENTS BUT WOULD, NEVERTHELESS, LIKE TO OFFER SEVERAL BRIEF COMMENTS ABOUT THEIR CRITICISMS.

TO THOSE ORGANIZATIONS OF A MORE LIBERAL PERSUASION WHO HAVE BEEN CRITICAL OF S.J.RES. ___, LET ME EMPHASIZE SEVERAL IMPORTANT POINTS.

FIRST, THE PROPOSED AMENDMENT WOULD ONLY PERMIT INDIVIDUAL OR GROUP SILENT PRAYER OR MEDITATION. IT WOULD NOT PERMIT THE EXPRESSION OF DENOMINATIONAL PRAYER, OR OF ANY OTHER ORAL OR VOCAL PRAYER.

SECOND, THE PROPOSED AMENDMENT WOULD NOT ESTABLISH ANY CONSTITUTIONAL RIGHT IN ANY INDIVIDUAL TO REQUIRE PRAYER IN THE SCHOOLS. IT WOULD SIMPLY LEAVE THIS DECISION WITH THE STATE AND LOCAL COMMUNITIES. NO COMMUNITY WOULD BE COMPELLED TO ALLOW PRAYER.

THIRD, THE PROPOSED AMENDMENT WOULD NOT REQUIRE ANY INDIVIDUAL TO PARTICIPATE IN SILENT PRAYER OR MEDITATION. REASONABLE ACCOMODATIONS WOULD HAVE TO BE MADE FOR INDIVIDUALS WHO CHOSE, FOR ANY REASON, NOT TO PARTICIPATE IN SUCH PRAYER.

FOURTH, THE PROPOSED AMENDMENT WOULD PROHIBIT ANY FORM OF OVERT OR SUBTLE ENCOURAGEMENT OF ANY PARTICULAR FORM OF PRAYER. NEITHER THE STATE NOR THE LOCAL COMMUNITY NOR THE CLASSROOM TEACHER COULD, IN ANY MANNER, ENCOURAGE THE SILENT EXPRESSION OF ANY SPECIFIC PRAYER.

FIFTH, UNDER THE PROPOSED AMENDMENT, THERE WOULD BE ABSOLUTELY NO ROLE FOR ANY PUBLIC AUTHORITY IN COMPOSING ANY PRAYER, DRAFTING ANY PRAYER, SELECTING ANY PRAYER, OR INFLUENCING ANY PRAYER. BECAUSE ONLY SILENT EXPRESSIONS OF PRAYER WOULD BE PERMISSIBLE, THE STATE WOULD HAVE NO RESPONSIBILITY IN THIS REGARD.

FINALLY, PRESSURE UPON MINORITY RELIGION STUDENTS WOULD ABSOLUTELY BE MINIMIZED UNDER THE PROPOSED AMENDMENT. BECAUSE IT RELATES ONLY TO SILENT PRAYER, EACH STUDENT WOULD BE ABLE TO UTTER THOSE THOUGHTS MOST MEANINGFUL TO THAT STUDENT. ALTHOUGH THEY WOULD BE FREE TO EXCUSE THEMSELVES FROM EVEN THE SILENT PERIOD, THERE WOULD BE VIRTUALLY NO NEED FOR ANY MINORITY RELIGION STUDENT TO HAVE TO EXCUSE HIMSELF FROM A CLASS-

ROOM IN A CONSPICUOUS MANNER OR TO EMBARRASS HIMSELF OR HERSELF AMONG HIS OR HER PEERS IN ANY WAY.

IN SHORT, MR. CHAIRMAN, THE PROPOSED AMENDMENT, S.J.RES. ___, FULLY RESPECTS THE VALUES OF RELIGIOUS TOLERANCE THAT UNDERLIE OUR CONSTITUTION, AS WELL AS ITS DIRECTION AGAINST FOSTERING UNNECESSARY ENTANGLEMENTS BETWEEN CHURCH AND STATE.

LET ME NOW SPEAK BRIEFLY TO SOME OF THE MORE CONSERVATIVE CRITICS OF THE PROPOSED AMENDMENTS. WHILE I AM, OF COURSE, SENSITIVE TO THEIR CONCERNS, I BELIEVE THAT MANY OF THESE ORGANIZATIONS OVERLOOK THE STRENGTHS OF THIS PROPOSAL.

FIRST, SIMPLY BECAUSE A PRAYER IS SILENT RATHER THAN VOCAL DOES NOT MEAN THAT IT IS A WEAK PRAYER. INDEED, I AM CONCERNED THAT ANY STATE-APPROVED OR STATE-SANCTIONED PRAYER, ONCE IT HAS GONE THROUGH THE NECESSARY COMMITTEES AND LEGISLATIBE BODIES, IS LIKELY TO BE SO WATERED-DOWN AND WEAK THAT IT WILL BE MEANINGLESS TO VIRTUALLY EVERY INDIVIDUAL STUDENT. THE GREAT VALUE OF SILENT PRAYER IS THAT EVERY CHILD CAN PRAY TO THEIR OWN PERSONAL VALUES IN AS INTENSE AND AS DIRECT A MANNER AS POSSIBLE. EVERY CHILD CAN BE ACCOMODATED, EVERY DAY, WITH THE MOST ROBUST EXPRESSIONS OF PERSONAL DEVOTION.

SECOND, I BELIEVE THAT IT WOULD REPRESENT A GREAT ACHIEVEMENT FOR THIS COUNTRY IF WE WERE ABLE TO RE-AFFIRM THROUGH THE PROPOSED AMENDMENT THE PROPER, HISTORICAL UNDERSTANDING OF THE "ESTABLISHMENT" CLAUSE THAT THERE IS A LIMITED, SUPPORTIVE ROLE BETWEEN THE STATE AND EXPRESSIONS OF RELIGIOUS VALUES. S.J.RES. ___ WOULD END THE REGIME WHICH HAS DEVELOPED IN THE PAST TWO DECADES BY WHICH THERE IS A LITTLE-DISGUISED STATE OF OFFICIAL ANTAGONISM BETWEEN CHURCH AND STATE.

THIRD, I BELIEVE THAT IT WOULD REPRESENT A GREAT ACHIEVEMENT FOR THIS COUNTRY IF IT WERE ABLE TO RE-AFFIRM THAT A STUDENT'S EDUCATION OUGHT PROPERLY TO CONSIST OF THE DEVELOPMENT

OF SPIRITUAL CHARACTER. THIS WOULD REVERSE THE DECADE LONG TREND BY WHICH PUBLIC SCHOOLS ARROGATE TO THEMSELVES MORE AND MORE TEACHING AND SOCIAL FUNCTIONS, WHILE DOING LESS AND LESS TO INCULCATE SOME SENSE OF PERSONAL REFLECTION AND INTROSPECTION. THIS WOULD BE HEALTHY FOR THE STUDENT AND, IN MY OPINION, HEALTHY FOR THE PUBLIC SCHOOL IN THIS COUNTRY.

FINALLY, I BELIEVE THAT THE "EQUAL ACCESS" PROVISIONS OF THE PENDING AMENDMENT WOULD ALSO SERVE TO CLARIFY AND EMPHASIZE THAT THERE ARE TWO RELIGION CLAUSES IN THE FIRST AMENDMENT-- THE 'ESTABLISHMENT' CLAUSE AND THE 'FREE EXERCISE' CLAUSE. SECTION 2 OF S.J.RES. ____ WOULD STRONGLY EMPHASIZE THAT THE CONSTITUTION PROTECTS RELIGIOUS SPEECH IN THE SAME MANNER THAT IT PROTECTS OTHER FORMS OF FREE SPEECH. THESE PROVISIONS WOULD ALSO MINIMIZE THE INTRUSION OF FEDERAL AUTHORITIES INTO MATTERS OF SCHOOL ADMINISTRATION.

IN SUMMARY, MR. CHAIRMAN, I BELIEVE THAT S.J.RES. ____ RESPECTS IMPORTANT AND LEGITIMATE PUBLIC POLICY OBJECTIVES SHARED BY INDIVIDUALS OF WIDELY DIVERGENT POLITICAL PHILOSOPHIES. I BELIEVE THAT IT REPRESENTS A CONSENSUS, NOT PERHAPS AMONG THE ORGANIZATIONS LEFT AND RIGHT FROM WHOM WE CONSTANTLY HEAR, BUT AMONG THE GREAT BODY OF THE AMERICAN PEOPLE. IT RESPECTS THE DIVERSITY OF THE RELIGIOUS EXPERIENCE IN THIS COUNTRY; IT RESPECTS THE TOLERANCE FOR MINORITY RELIGIONS THAT IS AT THE FOUNDATION OF OUR CONSTITUTION; IT RESPECTS THE PRINCIPLES OF THE FIRST AMENDMENT; AND IT RESPECTS THE DEEPLY FELT RELIGIOUS VALUES OF THE AMERICAN PEOPLE AND WHAT I BELIEVE IS THEIR DESIRE TO HAVE THEIR PUBLIC INSTITUTIONS ACCOMODATE THESE VALUES IN A BALANCED MANNER RATHER THAN MAINTAINING A HOSTILITY TOWARD THEM.

I WOULD RESPECTFULLY ASK MY FRIENDS ON BOTH SIDES OF THE POLITICAL SPECTRUM TO RECONSIDER THEIR OBJECTIONS TO THE PROPOSED AMENDMENT.

II

Calendar No. 641

98th CONGRESS
2d Session

S. J. RES. 212

[Report No. 98–347]

Proposing an amendment to the Constitution of the United States relating to voluntary silent prayer or meditation.

IN THE SENATE OF THE UNITED STATES

January 24 (legislative day, January 23), 1984

Mr. Thurmond (for himself, Mr. Hatch, and Mr. Grassley) introduced the following joint resolution; which was read twice and referred to the Committee on the Judiciary

January 24 (legislative day, January 23), 1984

Reported by Mr. Thurmond, without amendment and without recommendation

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JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States relating to voluntary silent prayer or meditation.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution if ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress:

"ARTICLE —

"SECTION 1. Nothing in this Constitution shall be construed to prohibit individual or group silent prayer or meditation in public schools. Neither the United States nor any State shall require any person to participate in such prayer or meditation, nor shall they encourage any particular form of prayer or meditation.

"SECTION 2. Nothing in this Constitution shall be construed to prohibit equal access to the use of public school facilities by all voluntary student groups.".

"OR PROHIBIT THE FREE EXERCISE THEREOF"

by

F.S.Donn

Perusing various commentaries both for and against the proposed Prayer Amendment, I have found an almost uniform lack of historical awareness. The subject is treated as if prayer in the schoolroom were an innovation about which no fund of information existed. Instead, reading from the Bible, and reciting or singing prayers to the God revealed therein, in the schoolroom and in other public edifices, has been a heritage of this nation from its founding. That which was without precedent was the ruling of the Supreme Court in 1962 that this traditional "exercise" in the halls of learning was unconstitutional, and must be discontinued. I submit a body of evidence which questions the validity of the Court's decision, and indicates that making it was an assumption of power not granted to the Court by the Constitution.

My early education was in the public schools of Washington, D.C. during the Administrations of William McKinley, Theodore Roosevelt, and William Howard Taft. In grammar school, each day began with the teacher reading a few verses from the Bible, followed by the class reciting the LORD's Prayer: "Our Father, who art in heaven, hallowed be thy name..." When we reached the end of that line, "deliver us from evil," the Catholic children stopped, while the Protestant kids continued: "for thine is the kingdom, and the power, and the glory for ever," with all joining in the Amen. Someone explained that the Catholics used a rendering that did not include the portion used by Protestants, and that was sufficient. The Bible apparently supplied by the system was a King James version.

In addition to the daily devotional exercise, we were taught three patriotic songs, each of which contained references to God: the Star Spangled Banner; America; and Keller's American Hymn. The last verse of the S.S.B. says:...praise the Power that has made and preserved us a nation. Then conquer we must, if our cause it is just, and this be our motto, 'In God is our trust."

America, last verse: "Our fathers' God to thee, author of liberty, to thee we sing. Long may our land be bright, with freedom's holy light, protect us by thy might, great God our King."

Keller's Hymn "Speed our Republic, Oh Father on high, lead us in pathways of glory and right."

In High School, we did not have the opening devotional exercise, but at least once a week we had a morning assembly, part of which was devoted to chorus singing. In addition to the previously used patriotic songs, we learned the Battle Hymn of the Republic: " Mine eyes have seen the glory of the coming of the Lord, He is trampling out the vintage where the grapes of wrath are stored, He has loosed the fateful lightning of his terrible swift sword. His truth is marching on." Also Kipling's Recessional: "God of our fathers known of old, Lord of our farflung battle lines...Lord God of hosts, be with us yet, lest we forget, lest we forget."

I attended Maryland Agricultural College, a land-grant school run by the State, but with some Government subsidy, and under military discipline. Periodically, we were marched to a morning assembly, which opened with the College President reading from a book of devotions which I believe was the Episcopal Book of Common Prayer. The student body was the typical American mixture of Protestants, Catholics, and a minority of Jews. Never did I hear any word of dissent, or any discussion of the propriety of the procedure. We were all Americans, practicing the traditional American Way, exercising an inherited American right. The Book of Common Prayer assuredly was not specified by the State or the Government, but it was the President's right to use it in a State educational institution, and there was none so devoid of understanding of the American Way as to raise that stupid yammer of "separation of church and State."

While in High School, I attended a closing session of Congress, scheduled for 12 noon on a specified date. Shortly before the hour, a clerk in the House of Representatives turned the hands of the clock back one hour, the Senators came in, and there began a series of speeches eulogizing veteran members who were retiring. When the clock again neared the hour, the Speaker gaveled for order, and when quiet prevailed, a strong baritone voice among the members began singing, "God be with you 'til we meet again, with a swelling chorus from floor and galleries joining in: "keep his banner floating o'er you, with his sheep securely fold you, God be with you 'til we meet again." And when the chorus was reached, which says: 'til we meet, 'til we meet, 'til we meet at Jesus' feet, there was no discernible diminution in the volume, though the few Jews present certainly refrained from voicing the name of Jesus—as everyone there would have acknowledged was their right.

What was revealed in those experiences was not that America was officially Christian, but that it had an inherent Bible-God-consciousness which was an integral part of its ethos deriving from its colonial progenitors. A further testimony was that every President from George Washington onward had taken the oath of office with one hand placed on a copy of the Bible, the Chief Justice of the Supreme Court conducting the ceremony.

That this Bible-God-consciousness continued to be manifested long after my youth is attested by the subsequent appearing of two additional patriotic prayer songs which gained nation-wide acceptance: "God Bless America," where the title identifies it as a prayer; and "America The Beautiful," which reflects a consciousness of the Grace of God as proclaimed in the Scriptures: "America, America, God shed His grace on thee..." Moreover, two chance encounters with younger folk in recent years, one of whom had been in elementary school in the period late 1940s—mid 1950s, the other late 1950s—mid 1960s. yielded the information that each had duplicated my experience of Bible reading and reciting the Lord's Prayer in the schoolroom. Thus was that heritage extended sixty-two years into this century.

A few commentators have raised the issue that school prayers associated with the Bible infringe the rights of children whose religion is other than the Judeo-Christian indigenous to America, usually citing those relating to Eastern deities. But, as I have emphasized, only the God of the Bible was ever referred to in any of the documents which reflect the ethos of the creators of this unique nation. The earliest oriental immigrants were very late arrivals on our shores. And why did they and their 20th century counterparts come here? Chiefly because, in the lands of their origin, and under the religions indigenous thereto, there was not to be found anything comparable to the way of life produced by the Bible-God-conscious builders of the United States, Those people all left lands not one of which could approach Abraham Lincoln's characterization of America as "this nation under God," nurturing "government of the people, by the people, and for the people." Those words were uttered as he dedicated a U.S. Cemetary at Gettysburg, Pennsylvania, and they were part of his prayer that these God-given blessings " might not perish from the earth." The seed of that threat was sown in the manner in which the Supreme Court in 1962 caused the heritage of Bible reading and prayer in the schoolroom to be discarded.

A Court of nine men, not elected by the people, and not accountable to them or their representatives in Congress, by an ukase as arbitrary as one that could have been issued by an old-line Russian Tzar, foisted upon those designated "we the people" an interpretation of the First Amendment to the Constitution which flouted the judgement of their predecessors during one hundred and seventy-five years, and mocked that time-honored tenet of democracy, "rule by the consent of the governed." As traditionally explained in Civics studies for seventh and eighth graders, the initial provision of the First Amendment was to prevent the establishment in this country of a national religious hierarchy which, State supported and beyond the control of the people, could become a suppressor of their liberties—as had proved true in some of the countries of Europe. That this was taught at the elementary level in school indicates that it was considered so elementary in logic that even a child could comprehend it. Was it beyond the mental grasp of the Justices of the 1962 Supreme Court? Impossible. They were conforming to the ideas of an atheistic minority harboring a deepseated antipathy for the Bible and its God. But, in doing so, they indulged in twisted reasoning, of which their predecessors, being men of integrity, were never guilty.

The precise origin of Bible reading and prayer in the schoolroom cannot be pinpointed. There is no record of it having been inaugurated by an act of Congress duly signed into law by a President. To refer to it as as an established religion defies comprehension by anyone with even a rudimentary acquaintance with the religions of the world, especially those of Western Civilization. Bible reading and prayer in the schoolroom had no founder to stamp it with his name, no creed, no ordinances or rites, no membership, no clergy, no organization. Yet the Supreme Court decreed that this heritage was an established religion, which automatically made Bible reading and reciting a prayer in the schoolroom an "exercise" of that religion. No problem. Those nine men apparently acted on the technicality that, while the First Amendment denied Congress the power to deal in any manner with religion, it placed no restrictions on the Supreme Court.

The Justices of the 1962 Court were at once masters of distorting the Constitution, and opportunists recognizing that by default of Congress their minuscule department had acquired power that none could challenge. They became yet another example of that old axiom: "power corrupts..."

How was it possible for the Supreme Court to exercise dictatorial power in such a vital area without challenge? In retrospect, the paramount cause seems to have been that, at that time, the leadership of the U.S. was undergoing a psychological disorientation which progressively was beguiling it to entangle the nation in that which I termed INSANITY's War in Southeast Asia(Vietnam), a military misadventure which to this day no one has been able to rationalize. From that beginning, it was crisis, crisis, crisis: President Kennedy's assassination; the war dragging on and sowing disunity from coast to coast; the Yom Kippur War and Arab oil embargo; then the Iranian hostage confrontation with its debacle in the desert. That series of calamities riveted the attention of the American people upon the evidence that their nation had become like a giant ship adrift on a vast ocean, sans chart, sans compass, and being handled by inept pilots of whom not one was sufficiently cognizant of our historical course to steer the Ship of State by dead reckoning. Vital as the Supreme Court's decision can now be understood to be for the future of our nation, there was no possibility for an appraisal of its full significance until the release of the hostages afforded a relative sense of calm on the national scene.

When the God-conscious majority of Americans—a recent Gallup poll reporting 94% expressing belief in God—began to realize that the Supreme Court in 1962 had destroyed a heritage vital to them, they understandably were confused, for the situation was without precedent. Never in two hundred years of U.S. history had there been such an assault on religious freedom. Never had there been an occasion to confront the fact that apparently there was no provision in the Constitution for an appeal from a Supreme Court decision. The only recourse seemed to be a Constitutional Amendment. However, an intensive scrutiny of the Constitution will disclose that the dictatorial power displayed by the Court has derived solely from an assumption on its part made possible by a default on the part of Congress.

The logical method of interpreting the Constitution is to view it from the position of its creators as they laid out the pattern and put together the parts in orderly sequence. Their attitude was explicitly revealed in the salutation, "We the people;" and they projected this concept onward when they closed their statements of purpose with the words: "to secure the blessings of liberty for ourselves and our posterity." They were saying for each succeeding generation: you must reposition yourselves continually in the "we the people" framework if erosion of your liberties is to be avoided. How vital this is can now be appraised as never before.

A study of the allotment of power as specified in the Constitution reveals that the framers were meticulous in making sure that no loophole be left for the intrusion of oligarchy as opposed to Congress—the elected representatives of the people—being the ultimate repository of power. Article I elaborates on the duties and powers of the Legislative branch; and in Section 8 there are 17 clauses dealing with specific areas. Then an 18th is all-inclusive, evidently designed to leave no exceptions: (emphasis mine)

> "To make ALL laws which shall be necessary and proper to carry into execution the foregoing powers, and ALL OTHER POWERS vested in the GOVERNMENT of the United States, or ANY DEPARTMENT OR OFFICER THEREOF."

Is the Supreme Court a department of the Government? Article 3 of the Constitution declares it to be. Certain areas of jurisdiction are referred to, but assuredly there is no intimation of reposing in the Court the power to arbitrarily interpret any part of that document and have that opinion become ipso facto the law of the land, beyond review, alteration, or repeal by any higher authority.

In a book titled, YOUR RUGGED CONSTITUTION, by Bruce Allyn Findlay and Esther Blair Findlay(Stanford University Press, 1950), the authors approached their article by article analysis in the manner to which I alluded. Each page on which the text of an article of the Constitution was presented had a reproduction of the top left corner of the written Constitution with We The People Article I prominently displayed on the border. Thus did they constantly remind the reader of that preeminent concept. However, when they came to Article 3, Sec.I—referring to the Supreme Court—their minds were tricked into digressing, a circumstance bearing on my thesis of a lack of historical perspective.

Quoting from page 145 of the above-mentioned book:(emphasis mine)

> "Congress makes the laws, subject to the President's approval or veto...the Supreme Court...interprets the laws. This includes the POWER to decide whether or not a law, either State or Federal, is in accord with the Constitution. This AWESOME POWER of the Supreme Court to declare laws unconstitutional is NOT DEFINITELY STATED IN THE CONSTITUTION, but the Court has ASSUMED it for more than a hundred years."

What an example of how the assumption of power by the Court has clouded the thinking of intelligent people. Accepting this as if it were authorized by the Constitution, the Findlays only vaguely and incidently considered the evidence that it was un-Constitutional. They asserted positively that the Court HAS this " awesome power," then incidentally they disclosed that the Court does not have it Constitutionally, but merely by unchallenged ASSUMPTION. In 1950, the authors had no occasion to think of their use of the word "awesome" as being portentious. But the 1962 Court's display of dictatorial power to "prohibit" an "exercise" of religion—sanctioned for so long that it had become a heritage—was in truth awesome. For, if left uncurbed by the superior power of Congress, the Court's assumed power will increasingly pose a threat of becoming a restricter of other "blessings of liberty."

It is doubtful that Congress presently has sufficient understanding of the paramountcy of its power under the Constitution to institute action toward reasserting that power relative to the Supreme Court. Having for so long accepted the illusion that the Court is a law unto itself, Congress has become impotent to even consider the possibility that it is authorized to override the Judiciary at its discretion, What now seems necessary is for "we the people" to concertedly focus the Congressional mind upon those words of the Constitution which empower it: "to make ALL LAWS necessary...for carrying into execution the foregoing(specified) powers, and ALL OTHER POWERS VESTED BY THIS CONSTITUTION IN THE GOVERNMENT OF THE UNITED STATES, OR ANY DEPARTMENT OR OFFICER THEREOF." Logically, merely a joint resolution of Congress could nullify the 1962 decision of the Court if that resolution had the support of the great majority of the electorate; for where could the Supreme Court appeal against a consensus of that nature? But a lesson that is imperative to heed from this attack on religious freedom is the need for an Amendment that will spell out in language impossible of being distorted that, inasmuch as Congress is denied by the First Amendment the power to either "establish" religion "or prohibit the free exercise thereof," no court, or other department or officer of the government shall ever presume to rule in religious matters. Also, wisdom suggests that Congress should create a Committee on Religion, to review the entire subject of religious freedom, having in view the possibility of issuing some guidelines on such questions as what constitutes an "establishment of religion," and, with respect to the possibility of restoring the heritage of Bible reading and prayer in the schoolroom, the scope of the jurisdiction within which this could best be decided: local school district, county, municipality, the determining factor being always the will of the majority of the people.

The atheistic minority, for whom the 1962 Court decision was considered a triumph over the Bible-God-conscious majority, will dismiss this as a simplistic approach to an issue which they have already obfuscated by their coining of that asinine phrase "separation of Church and State." But in a nation where the government is truly representative of "we the people",what is the State? It is simply a devise of the majority for operating the society according to certain principles which have been in use for centuries throughout Christendom, and are largely traceable to the Ten Commandments. What also comprises "church?" A survey made many years ago(I believe it was in the 1930s), found 350+ sects all claiming derivation from the Bible, yet entertaining differences that prevented them from becoming a monolithic Church. For Congress to "establish" a State religion,it would have to perform the miracle of either abolishing all but one of these sects, or of synthesizing their divergencies into a composite acceptable to the majority. Did Bible reading and prayer in the schoolroom have even a remote relation to this type of action on the part of Gongress? NO!

The 1962 Court's case against the heritage to which I have been referring was contrived in toto; and though my principal reason for condemnation is that it was aimed initially at religious freedom, I sound an alarm because of the contempt the Court showed for the foundational principle of "we the people." There was contempt for that provision whereby Congress, as the elected representatives of the people, was designated the arbiter of what laws were "necessary" on a national scale to perpetuate the "blessings of liberty." And above all was there contempt for the specification that not even the supreme power of Congress could be used to "prohibit the free exercise" of religion.

This contemptuous display of dictatorial power can be terminated forthrightly by Congress if the majority of the citizens of this nation demand it. If the time, effort, and money being expended on the laborious process of trying to enact a Prayer Amendment were concentrated on stimulating the appropriate action by that lawmaking body, the way could be cleared to restore the heritage of Bible reading, reciting or singing prayers, or other displays of the traditional Bible-God-consciousness, wherever, whenever, or in whatever manner the majority of the people choose.

TESTIMONY submitted to the United States Senate Committee on the Judiciary

in behalf of CITIZENS FOR PUBLIC PRAYER by its National Coordinator,

Rev. Robert G. Howes, 2400 Twenty-First Street, S., Nashville, Tenn 37212 (615 383-6393)

29 April 1983

> Almighty God, we acknowledge our dependence upon Thee, and we ask Thy blessings upon us, our parents, our teachers, and our country." (PRAYER COMPOSED BY A GROUP OF RELIGIOUS LEADERS and authorized for voluntary recitation in the public schools of the State of New York; subject of the first prayer-ban decision)

> We believe that thus the school will fulfill its high function of supplementing the training of the home, ever intensifying in the child that love for God, for parents and for home which is the mark of true character training and the sure guarantee of a country's welfare. (Statement of Belief, New York State Board of Regents when, in 1951, it authorized the above prayer for voluntary recitation in the public schools of that State)

We come in full support of voluntary prayer in the nation's public schools. We are a federation of citizens from across America, founded in and active in this one cause since 1963. We are entirely nonpartisan and nonsectarian.

In a larger sense, though, the subject here is civil rights. The civil right of freedom of religion is clearly at stake. So is that most basic freedom, the right of the American people to be heard responsively in the place where their government sits. For more than twenty years, these rights have been denied, mocked and obstructed.

We understand the frustration which drives many members to seek remedies other than a constitutional amendment. We concur in the "equal access" approach and we empathize with those who suggest a "withdrawal of jurisdiction." Whatever can be done, fundamentally, to restore the civil right of public prayer has out endorsement. Still, as we shall demonstrate below, the only adequate remedy for a basic misinterpretation of the Constitution is a constitutional amendment which restores the relevant portion of that document to its original and common sense meaning. A cancer which is bandaded remains active. Only by excising the cancerous illogic of a mistaken Court can we be safe again not only in our public schools but in every other practice of public reverence.

We supported SJ Res #199 in the last session. We support any similarly careful proposal for amendment which stands now before you. And we remain convinced, as we shall also demonstrate below, that the American people in overwhelming numbers will support such a proposal when it reaches their fifty state capitols.

This issue has been around an unconscionably long time.It has been misstated, misrepresented, minimized and often forgotten. Permit us here to rehearse the circumstances in which we now appeal to you to- LET THE PEOPLE DECIDE. First, the principles involved. Second, the precedent. Third, our response to some major objections.

I. Principles

Many argued last year that British action in the Falklands was, in one sense, a tempest in a tea pot. Some may also have argued that the penny on the pound of tea in Boston in the 1770s was a similar tempest. What difference does it make globally who rules in Port Stanley? What difference did it make globally whether colonials drank taxed tea? In both instances, and in many others, most thinking people realized that a principle was at stake. In the light of that principle action was both urgent and right. So too here. School prayer is the top of an iceberg full of principles. It is no narrow, tangential issue. Those who would demean it by confining it to debate over "merely a morning devotional" are either naive or willfully deceptive.Indeed, anyone who says to you now- why bother with such trivia,the Congress has more important things to do- merits your suspicion. True your agenda is crowded. True the economic stability of the nation demands your notice again and again. But "man does not live by bread a one." Where fundamental principles are controverted, surely the Congress of the United States must be equally attentive! The first principle involved is how the religion clauses in the First Amendment are to be interpreted. More on this below in II. The second principle is whether and how the manifest will of the nation is to prevail on so major a matter. The issue has been on three state ballots officially. In Florida, Maryland and Massachusetts school prayer prevailed by majorities of better than 2 - 1. Note the different geographic, political, religious and social situation of these states. Again and again national polls demonstrate that on no other "social issue" is the American people more united than in support of voluntary school prayer. Examples- Gallup- 75%, Harris -82% (1972); Gallup -77% (1975); Gallup- 79%, Harris -69% (1982). Far from being "divisive" this issue unites the nation as none other! And yet again and again, this manifest will has been thwarted by obstructionist tactics in congressional committees. Those who control the destinies of their representative bodies have again and again prevented the people from deciding the issue. Again and again, to get around obstructionism in committee, school prayer proposals have been brought to the floor as "riders" on extraneous bills. Clearly, this is not the best way to get at the subject. But, to those who now complain if similar tactics are used, we say- OK, but then stop blocking normal action in the committees you delay and filibu tering when any prayer proposal reaches the floor! Meanwhile, in many states, the people have tried to do the best they can- with makeshift measures to elude the Court's prayer-ban. And defenders of "civil liberty" again and again oppose even these ineffective substitutes. When will they hear, when will you hear, the clear voice of grass roots everywhere? What the people want is not legal subterfuges. What they want is voluntary prayer back in the classrooms their taxes support! Consider. If the manifest national will cannot be heard in the chambers of the Congress, the democratic process is stultified. And, where this will is so huge and so sustained, the mockery of the democracy is even more unconscionable! The third principle is that public reverence is a constitutive part of this republic and has been since we began. America's Catholic bishops put it- "religion is our chief national asset." We are "a Nation under God." As President Reagan said it on National Prayer Day (6 May 1982):

> Prayer has sustained our people in crisis, strengthened us in times of challenge, and guided us through our daily liees since the first settlers came to this continent. Our forebears came not for gold but mainly in search of God and the freedom to worship in their own way...Today prayer is still a powerful force in America, and faith in God is a mighty source of strength.

And yet, as he spoke, only the children in public schools were constitutionally forbidden to join him in vocal prayer! What a travesty of our traditions.

II. Precedent

Every major Court decision sets precedents. The common law proceeds in large measure from precedent to precedent. Our strongest complaint against the prayer-ban decisions is that they set fundamentally evil precedents. They do so in our schools. As Francis Cardinal Spellman put it- "the decisions strike at the very heart of the Godly tradition in which America's children have for so long been raised." But they do much more than this. They place, as it were, a fatal equation. Establishment is interpreted to mean any act of "religion" however voluntary, however nondenominational. Even to question this equation, the Court said in its second prayer-ban decision, is "of value only as an academic exercise." We cannot, obviously, here exhaust the historical debate as to what the First Amendment really meant. Suffice it to offer three citations:

i. The federal government concerned itself not with separation but with equality. The real object of the Amendment was to exclude rivalry among Christian sects and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. (Joseph Story, 1891, p. 33)

ii. The Supreme Court's decisions in Church-State cases have, for the most part been founded on a simplistic and largely fictionalized version of American history. (They) misrepresent the Church-State intentions of Madison, Jefferson and the Virginia legislature- which disestablished the Anglican Church in 1786- and ignore those of the First Amendment framers in the First Congress. (Professor Robert J. Cord, "Separation of Church and State," Lambeth, New York City, 1982, p. 28)

iii. Mr. Justice Stewart in dissenting from the prayer-ban illogic said that the Court "has misapplied a great constitutional principle."

The net result of this fundamentally flawed precedent is this:

iv. By banning all 'revealed,' redemptive,' 'theocratic' or 'supernatural' religion from the public school classroom and compelling children to attend public schools where those espousing secular and humanistic ideologies are able to do so uncontrolled by any equivalently asserted views, the Court is establishing religion...Such a posture forces religious dissenters to shoulder heavy burdens (198) ...The practical effect of the Court's double definition of religion and its biased concept of religious neutrality is to close the public

> school doors to theism, while leaving them open to every other ism imaginable. (Professor Paul James Toscan , "Brigham Young Law Review," 1979, p. 2) *

Consider further. The Ten Commandments were removed from a court house wall in Salt Lake City. Christmas displays on public commons have been attacked. Suits were instituted to reprimand the Christmas astronauts (1968) who had recited from Gensis while rounding the moon in a public machine on public time and on the public payroll. Children in public kindergartens have been denied the right to thank God for their food. Children in public schools of Netcong, New Jersey, have been re fused the opportunity to read together, without comment, the very prayers with which the Senate had begun its session a few days previously. We could go on. Clearly, a CANCER has been placed in the national bloodstream. Only a restorative constitutional amendment which returns to First Amendment to its original and common sense meaning is adequate to excise this cancer. And, in the process of debate toward a prayer amendment at fifty state capitols we will once again begin the process of national renewal in the faith of our fathers.

III. Some Objections

1. What about inarticulate meditation or a moment of silence? A silent God is surely preferable to no God. Either of these apparent options may seem at first glance to satisfy the need. In fact, neither does. There is a great danger that having enabled one of them people may breathe a sigh of relief and stop fighting for the full civil right. Consider. The spoken brotherhood of prayer was an overt and unitive act. It brought students and teachers together. Meditation or separate silences, on the other hand, divide. Nor is there any guarantee that such periods would be in fact religious. Besides the ability to meditate well is difficult. Shall we suppose that children can automatically do it thoughtfully? Neither option thus suffices.

2. What about classes in comparative religion? Some contend this is still possible. Perhaps. But consider. Who would teach the class? How shall we assure that, for instance, a Baptist teacher properly presents Catholicism or vice versa? Would not the same intolerant people who removed voluntary prayer object in court if even the slightest deviation from objectivity occurred in any classroom? Besides religion is far more, for example, than a) which Pope ruled when and how, b) who painted which Madonna, c) on what dates and in what manner did Mormonism begin?, d) what Wesley and Calvin said and did. Religion is affective, uplift, a spirit much more than it is dry data stripped of emotion and enthusiasm. To emasculate it into merely history, merely art and merely creedal statements is to deny its most fundamental soul.

3. Does not religion belong rather in home and church than in school We do not strengthen religion in our homes and churches by wiping it off the lips of our sons and daughters in public school. Religion in a "Nation Under God" is not merely a private matter to be practiced in sheltered homes and before sectarian altars. "Religion," said our Catholic bishops, "is our chief national asset." What is necessary is a circle of mutually reinforcing reverences, in home, in church and in the public school. If that circle is broken in the classroom, our children are taught loud and clear- keep God to yourselves. He has no overt meaning when we do things together. He has no place in our public life. This is a total contradiction of those many reverent practices which distinguish the commonwealth they later experience.

4. Is not "school prayer" opposed by many "religious leaders?" Many religious leaders favor school prayer. Among them, Dr. Billy Graham, the National Association of Evangelicals, the Southern Baptist Convention, the late Episcopal Bishop James Pike, the late Catholic Bishop Fulton Sheen, the late Cardinal Francis Spellman, Greek Orthodox Archbishop Iakovos! True, there are some so-called "religious leaders" who have not only opposed but, by and large, been vehement in their negativism. We call most of them GENERALS WITHOUT ARMIES. They do not enjoy even the support, in many instances, of their own congregations! They do, however, have access to church publications, religion editors in the media, xerox machines, etc..

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*For further detail on the constitutional situation and the evil precedent of the two prayer-ban decisions, see "The Supreme Court and Public Prayer," Professor Charles E. Rice -now at University of Notre Dame Law School- Fordham University Press, New York City, 1964.

They make a noise entirely disproportionate to their numbers. Their principal arguments would seem to be two. First, that "religion" belongs in home and church not in school. (See #3 above). Second, that "school prayer" in fact demeans "religion." We disagree again. It is a fact that what children do, as it were, by rote is sometimes poorly done. The solution to this problem, however, is not to abolish some practice which is in itself salutary but rather to do it more reflectively. Consider. Children sing "The Star Spangled Banner" badly- as do most of us. Shall we then abolish it? Children do not perform Shakespeare as he is acted in Stratford-on-Avon. Shall we then exclude Shakespeare from school theatrics? Children do not pray like John Wesley or Thomas Aquinas. Shall we, therefore, banish prayer from the public classroom? "More things are wrought by prayer," says the Bible, "than the world knows." Were there mumbled prayers in public school? Certainly. Children are not ultimate theologians. There are mumbled prayers in Congress, in response to many invocations, etc.. We do not therefore abolish the practice. Prayer, explicit reverence for the Deity (e.g., on our coins, in the Pledge of Allegiance)- this is part of our national inheritance and contemporary practice. It may not always be profound. Still, preparation to become part of such prayer, such explicit reverence, is entirely consonant in and proper to public education. We regret the opposition of these GENERALS WITHOUT ARMIES. We do not question their sincerity. But we must question the premises on which they argue, their support at the grass roots even in their own congregations and, above all, the curious venom which many of them bring to the debate.

5. Majority/Minority? This dificulty seems insurmountable. It is not. Tolerance is a two way street. If I ask tolerance, I too must tolerate. Consider. There are twenty students in a public classroom. Sixteen wish to pray together, or at least their parents so wish; four do not wish to pray together, or at least their parents do not so wish. Two things can happen. The minority four may say- we don't want to pray so no one in this classroom will pray. Or they may say- we don't want to pray but our friends do. So long as we are not forced to pray, we will respect their right and will stand excused while they pray. I ask you, which is the American way? Reasonable people can reasonably accommodate in this matter of mutual respect for mutual rights. Besides those who oppose public expressions of religion must use coins with God on them, pay taxes for military chaplains, etc.. What better preparation for citizenship in an overtly reverent republic than this kind of a mutually tolerant experience in the public classroom?

6. Whose prayer? Reasonable people, meeting reasonably, can develop prayer practices which are reasonably right. We did so before with a maximum of decent common sense and a bare minimum of mistake. Surely in an age of inter-faith harmony we can do so again. As with all civil rights there are problems of language and implementation. How shall we say a civil right? How shall it be equitably practiced? That such problems impact on the civil right of freedom of religion in the public classroom we admit. But they can be solved by reasonable people meeting reasonably. They can never be solved by bigots fighting over every cross on every t and every punctuation mark. Such dialogue and such consensus is, indeed, one of our proudest inheritances. School prayer did for many decades and can again exemplify what Bishop James Pike called "the great American middle way." He meant that reasonable accommodation among us of a freedom of religion which steered reasonably between outright establishment of a state church and outright alienation of religion from any and all public practices. For instance, the prayer we use in our schools could be excerpted from the reverent words of our presidents, from historic documents, etc. Besides, there are always courts available where there is error in judgment.

"I believe we can restore a freedom that our Constitution always meant to protect. I have never believed that the oft-quoted (First) amendment was supposed to protect us from religion. It was to protect religion from government tyranny. Together, let us take up the challenge to reawaken America's religious and moral heart, recognizing that a deep and abiding faith in God is the rock upon which this great nation was founded." (President Reagan, White House, D.C., 6 May 1982)

"The practical effect of the Court's double definition of religion and its biased concept of religious neutrality is to close the public school doors to theism, while leaving them open to every other ism imaginable." (Toscano, 1979)

Statement of: E. STANLEY RITTENHOUSE, Special Consultant, LIBERTY LOBBY
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202 - 546-5611

Submitted to: U. S. SENATE CONSTITUTION SUBCOMMITTEE

On: PRAYER IN PUBLIC SCHOOLS AND OTHER PUBLIC INSTITUTIONS (S.J. Res. 73)

May 20, 1983

Mr. Chairman and Members of the Committee:

I am E. Stanley Rittenhouse, special consultant for LIBERTY LOBBY. I appreciate this opportunity to submit for the record the views of our more than 30,000-member Board of Policy, as well as approximately a million readers of our weekly newspaper, The SPOTLIGHT.

Mr. Chairman, as originally drafted and interpreted, the First Amendment to the Constitution did not deny the right to voluntary, nondenominational prayer in schools. In fact, public prayer in this country is a well-established tradition. Congress itself opens each daily session with a prayer. Many government meetings and functions also begin with prayer. Chaplains and representatives of organized religions participate in many government activities. And in none of these instances is the First Amendment violated.

However, the Supreme Court's interpretation of the First Amendment banning school prayer makes it necessary for Congress to mandate specifically by constitutional amendment the right of the people "lawfully assembled to participate voluntarily in nondenominational prayer or meditation."

On the subject of religion, the Communist Manifesto proclaims: "Communism abolishes eternal truths, it abolishes all religion, and all morality, instead of constituting them on a new basis; it therefore acts in contradiction to all past historical experience." There is a very good reason why Amendment I to the Constitution came into being.

In the beginning, the settlers of Virginia and the Pilgrims of Massachusetts were in search of a governmental climate that provided an environment of religious freedom. They established it, preserved it and passed it on to us via the U.S. Constitution. Their desire to worship and praise God, honor and obey the Lord was rewarded by God's blessing America as no other country in history has been blessed.

He showered it with material prosperity, individual liberty and peace and freedom unheard of in history. America abounds with the fruits of such blessings, which came as a result of the first Americans' humbling themselves and praying in their search to serve the true and living God. This is America's foundation!

Christopher Columbus said, "It was the Lord who put into my mind the fact that it would be possible to sail from here to the Indies" and he hoped that the natives "might be led to become Christians."

The Mayflower Compact was a Christian document throughout and William Bradford, a Pilgrim, wrote of "propagating and advancing ye Gospell of ye Kingdom of Christ."

The first charter of Virginia declared:

> We, greatly commending and graciously accepting of, the desires of the furtherance of so noble a work, which may be the Providence of almighty God, hereafter tend to the glory of His divine majesty, in propagating of Christian religion . . .

The Massachusetts Charter reads:

> To win and invite the natives of the country to a knowledge of the only true God and Savior of mankind, and the Christian faith . . .

And as the years passed, all the original colonies acknowledged God openly and publicly in their charters and later their constitutions, reflecting Christianity.

The Declaration of Independence acknowledged the fact that "We are endowed by our Creator with certain unalienable rights" and concludes "with a firm reliance on the protection of divine Providence." Only a nation not ashamed openly to pray to Him can rely on divine providence.

George Washington asked his troops to pray and declared a National Day of Prayer every spring during the course of the American Revolution. He gave full credit to divine providence for the victory. Washington repeatedly saw the hand of God work in this nation and in his life:

> I trust in that providence, which has saved us in six troubles, yea, in seven, to rescue us again from any imminent, though unseen dangers. Nothing, however, on our part, ought to be left undone.

That includes praying.

He realized that "it is the duty of all nations to acknowledge the Providence of Almighty God, to obey His will ("that men ought always to pray"--Luke 18:1), to be grateful for His benefits, and humbly to implore His protection and favor."

We all know that the writing of the Constitution didn't get in gear until Benjamin Franklin asked for prayer. Then with the help of the Lord, the men having prayed to Him each morning, the drafting just "flowed."

Even the secular historians, such as H.G. Wells, recognized that our Constitution is "indubitably Christian."

Yes, America from day one was a praying Christian nation--but with religious freedom for all. This has been confirmed on numerous occasions by the Supreme Court as it upheld general Christianity. In the famous Church of the Holy Trinity vs. U.S. (1892), among others, the Court ruled that "We are a Christian nation . . . (and that) nothing be done to hurt Christianity."

Thus the Supreme Court had ruled that where conflict is with Christian and non-Christian belief, Christianity prevails, for we are founded, according to the Supreme Court, to "legislate, propagate and secure the general Christian faith." This is our bedrock foundation; all religious freedom stems from this. Underlining it all is general Christianity, its precepts and principles. That fact is as real as the Constitution itself and provides the basic reason why "individual or group prayer in public schools or other public institutions," to quote S.J. Res. 73, should never be prohibited.

The modern Supreme Court has confirmed all the above. In Roemer vs. Maryland (1976), the Court stated, "Separation of church and state was never intended or required. Neutrality among Godly religions was the requirement." In other words the Court did not rule favoring "separation" but rather on neutrality which is completely consistent with the First Amendment.

In Abington (Pa.) vs. Schempp (1963), the Court held that "In the relationship between man and religion, the State is firmly committed to a position of neutrality." In Engel vs. Vitale (1962), the Court ruled:

The First Amendment leaves the government in a position not of hostility to religion but of neutrality. The philosophy is that the atheist or agnostic--the nonbeliever--is entitled to go his own way (emphasis added). The philosophy is that if government interferes in matters spiritual, it will be a divisive force. The First Amendment teaches that a government neutral in the field of religion better serves all religious interests.

Consequently, while the Constitution guarantees and the Court has confirmed the free exercise of religion--including Christianity and voluntary prayers in school--it guarantees the religious (or non-religious) rights of all. (The courts have already ruled that atheism is a religion.)

The Supreme Court has also declared:

> The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief (Abington vs. Schempp).

In other words, government must not deter a religious belief, including prayer in public schools or other public institutions.

Consequently, the courts never banned prayers from schools but do prohibit a prescribed prayer as written by the state (government at any level) which would, in effect, create a state religion, as minor a point as that may be. Thus S.J. Res. 73 should be passed because it is totally consistent with our heritage, our foundation as a nation, our state charters and constitutions and the Supreme Court rulings down through the years.

The de facto interpretation of the Supreme Court's rulings by school boards and the intimidation from such groups as the ACLU (the fear of lawsuits) across the country have made mockery of the Constitution and our Christian heritage. Blame doesn't fall solely on the Supreme Court but rather on the timid school boards over the land. Their emphasis has been on the first part of the First Amendment ("Congress shall make no law respecting an establishment of religion"), while ignoring the second half ("or prohibiting the free exercise thereof"). S.J. Res. 73 is totally consistent with the above.

The second half stresses that government must be neutral when it comes to religion; in other words, neutrality, not separation. Neutrality secures God-given, unalienable rights, not something government decrees but which God gives to all citizens. Our Constitution secures these rights and protects them from government or court abuse. Conversely, for government and its courts to prohibit Godly prayers is to establish a state religion--that of no prayers, that of humanism, an ungodly religion.

If prayer is rejected (de facto or otherwise), then God is rejected; to reject Him is to accept humanism. If a nation accepts humanism, then it has rejected the work of Christ. That in turn pleases those whose goal is de-Christianizing America.

Rejection of prayer by those in authority, simply by denying freedom of opportunity to pray, separates America from her roots. Before our country can be changed from a God-fearing (In God We Trust) nation to a Christ-rejecting, God-denying humanist state, the tie that bound our nation to the God of the Bible must be broken. This is one reason why the humanists, Zionists, ACLU, et al., are throwing temper tantrums over President Reagan's proclaiming 1983 the "Year of the Bible."

If a nation rejects God by denying the freedom of prayer, God will turn His back on that nation. He has done this in the past to those who reject and deny Him and He will do so to America simply because God is no respecter of persons or nations. His standard is consistent. With conditions in the world rapidly deteriorating as a result of worldwide Godless leadership, can America really afford to strike out on its own? The U.S. needs all the help it can get.

The Lord told Solomon exactly what is needed should a nation go astray and/or need God's help:

> If My people who are called by My name shall humble themselves and pray and seek My face and turn from their wicked ways, then will I hear from heaven, and will forgive their sin, and will heal their land (II Chron. 7:14).

But the following verse is equally important for it points out exactly what the Lord wants--prayer. "Now My eyes shall be open and My ears attentive to the prayer that is made in this place" (II Chron. 7:15). Prayer is what the Lord wants and is waiting for and it is no strange coincidence that it is prayer that the Godless people are working so hard to remove from the American public scene. If the anti-Christ folks (Christ referred to them as "scribes and Pharisees, hypocrites" in Matthew 23) have their way in America, the Lord will not hear any prayers go up from Americans' schools or other public institutions.

Congress faces the decision of whom it will serve--this anti-God, anti-Christ anti-prayer crowd or what the Lord wants and expects as pointed out in the verses above and elsewhere. Luke 18:1 says, "And He spoke a parable unto them to this end, that men ought always to pray, and not to faint." If a nation, as a nation, doesn't pray, as times get tougher that nation will collapse from fear!

The anti-prayer people with their undue influence and their control over America's mass media have established their de facto ruling in the minds of people that no prayer is allowed. To remove that false conception once and for all, totally, the Senate should vote clearly on this issue so as to enforce the correct constitutional position and the Supreme Court's real intent of its previous rulings.

S.J. Res. 73 can be used mightily to overcome the efforts of those who unconstitutionally oppose prayer in public schools and other public institutions. Once again we can restore our nation as one that truly does trust in God!

Mr. Chairman, literally hundreds of prayer resolutions have been introduced into Congress. Most of them died swiftly. Some have lingered just long enough to expire in committee. It is obvious the question is not going to be swept under the rug. It will not "just go away."

I hope this committee will accept the mandate of the majority of the American people who want the same freedom guaranteed to them prior to 1962 and 1963 returned to their children and later descendants. Religion is intensely personal; only those who wish to pray would do so. Not to allow them to pray is a form of insidious discrimination and has no place in American life.

One final thought. Earlier this year Alexander Solzhenitsyn was awarded the $170,000 Templeton Foundation Prize for progress in religion. In responding to the announcement that he had won, Solzhenitsyn said, "When prayers in school are forbidden even in a free country, it is not much more tolerable than in communist countries, only in that it lacks the hammering-in of atheism."

I urge you to settle this national problem once and for all by approving S.J. Res. 73.

Thank you again for this opportunity to submit our statement for the record.

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STATEMENT ON
SENATE JOINT RESOLUTION 73

submitted by

MONSIGNOR DANIEL HOYE

on behalf of the

UNITED STATES CATHOLIC CONFERENCE

On behalf of the United States Catholic Conference I express sincere appreciation for the opportunity to comment on Senate Joint Resolution 73, a proposal to amend the Constitution to permit voluntary prayer in public schools or other public institutions. The intent of the proposed amendment is a positive step towards assuring the efficacy of the Religion Clauses of the First Amendment. However, in failing to include the right to receive religious instruction, the amendment omits a component which is essential to the integrity of the right to pray.

The United States Catholic Conference has always given unqualified support to the public expression of faith in God through voluntary prayer. This is a fundamental part of the American heritage. This support stems from the concern of the Catholic Church for the moral and civic responsibility of all Americans. Catholic education in this country is grounded in the Church's commitment to nurture civic strength and awareness under religious auspices. Because two thirds of the Catholic school-age children in this country are enrolled in our public schools, and with a keen recognition of the interdependence all of us have upon one another, Catholic concern extends to public education and equals that for private education.

In this context, the United States Catholic Conference views the proposed constitutional amendment as a call to find opportunities for the spiritual and religious development of students enrolled in public schools while respecting the practices and structure of public education. Basic to our position, however, is the belief that there is no such thing as a value-free education. In fact, the question is not _whether_ education inculcates values, but rather _what_ values are inculcated by a particular educational program. A balanced response to this question has been made a practical impossibility by Supreme Court decisions concerning prayer and Bible reading. In effect, those decisions attempt to achieve neutrality in an educational context which, as a practical matter, defies true neutrality.

Against this background the United States Catholic Conference believes that the amendment in Senate Joint Resolution 73 does not adequately and effectively assure the right of America's children to express their faith. In the context of public schools this right must include the right voluntarily to receive religious instruction consistent with their beliefs and the practices of their own faith traditions.

Prayer in school is significantly different than prayer at other public functions because it involves teachers and students in a learning situation. For many children, prayer alone will not necessarily lead to a deeper understanding of faith, or even to the significance and importance of prayer itself. To this end religious instruction becomes an integral aspect of the prayer in schools issue. Prayer, without a framework of voluntary instruction in the child's religious tradition, is not sufficient fully to insure the individual's religious freedom. The present proposal would have mainly symbolic value and only minimal pedagogical value. As such, it is not of sufficient merit to justify the problems it might create in terms of the American diversity of religious beliefs and traditions and the right of religious minorities in our pluralistic society.

The United States Catholic Conference reaffirms the Church's commitment to protect religious freedom by submitting that any constitutional amendment of the kind under consideration should include religious instruction, on a voluntary basis and under non-governmental auspices, on the premises of public schools and other public institutions.

Incorporated as part of this statement is the attached memorandum of Wilfred R. Caron, the General Counsel of the United States Catholic Conference. After reviewing relevant judicial decisions and the history of the Religion Clauses of the First Amendment, it sets forth one possible formulation for an amendment which would protect the rights voluntarily to pray and to receive religious instruction under private auspices on public premises. The Committee may wish to consider that proposal, on the understanding that the United States Catholic Conference would support a proposed constitutional amendment of such tenor and effect.

Again, I express my appreciation for the opportunity to submit this statement on behalf of the United States Catholic Conference.

UNITED STATES CATHOLIC CONFERENCE
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Office of General Counsel

May 6, 1983

MEMORANDUM

TO: Monsignor Hoye

FROM: Wilfred R. Caron

RE: Senate Joint Resolution 73 ("S.J. Res. 73")

At your request, I have prepared this memorandum in aid of your statement to be filed concerning S.J. Res. 73 with the Subcommittee on the Constitution of the Senate Judiciary Committee. The primary focus is upon the constitutional law pertaining to prayer and religious instruction on public premises, and the legal effect of S.J. Res. 73 in those areas.

I. LEGAL BACKGROUND: MAJOR JUDICIAL OPINIONS

As a result of judicial interpretations of the Establishment Clause of the First Amendment, children are denied the right voluntarily to participate in prayer or to receive religious instruction in the faith of their choice at the public schools they attend. The exclusion of voluntary prayer and religious instruction from public education is rooted in decisions of the United States Supreme Court during the last four decades.

A. Religious Instruction

In McCollum v. Board of Education[1] the Court held unconstitutional a released time program under which public school children in grades four through nine were permitted once a week to attend classes in religious instruction. The classes were conducted in regular classrooms during school hours by Protestant teachers, a Jewish rabbi, and Catholic priests, employed at no expense to school authorities by a private voluntary association of interested citizens. The Court held that the program utilized the tax-established and tax-supported public school system to aid religious groups to spread their faith in violation of the Establishment Clause.

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[1] 333 U.S. 203 (1948).

Four years later, in Zorach v. Clausen[2] the Court upheld a statutory program which permitted public schools to release students for one hour during the school day in order to attend religious centers for religious instruction or devotional exercises. Declining to read into the Constitution a philosophy of hostility to religion, the Court concluded that it would have to press the concept of separation of church and state to extremes to condemn the statute on constitutional grounds.[3] Writing for the majority, Justice Douglas stated:

> When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups.[4]

However, Zorach's theme of accommodation did not diminish the impact of McCollum in the slightest.

McCollum purged the value system at work in the public schools of the leavening influence of religious instruction under private auspices. Its progeny completed the work of secularization in the area of prayer.

B. Prayer

In Engel v. Vitale[5] the Court struck down recitation of a short, non-denominational prayer composed by state officials. The practice had been upheld by the New York Court of Appeals provided no student was compelled to join in prayer. The

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[2] 343 U.S. 306 (1952).

[3] Id. at 313.

[4] Id. at 313-14.

[5] 370 U.S. 421 (1962).

Supreme Court disagreed, holding that under the Establishment Clause it is "no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by the government."[6] The Court went on to note that the Establishment Clause was added to the Constitution to assure that the prestige of government would not be used "to control, support or influence the kinds of prayer the American people can say ...."[7]

One year later the Court decided the companion cases of School District of Abington v. Schempp and Murray v. Curlett.[8] The Court invalidated two state statutes requiring, respectively, (i) a daily reading from the Bible, and (ii) a daily reading from the Bible or the recitation of the Lord's Prayer. In both instances attendance at these exercises was voluntary. The Court concluded that both laws required religious exercises in violation of the command of the First Amendment that the government maintain strict neutrality, neither aiding nor opposing religion.[9]

In a relatively recent case, Stone v. Graham,[10] the Court held unconstitutional the posting in public school classrooms of a copy of the Ten Commandments. The statute involved required that the cost of the copies be funded only through voluntary contributions made to the state for that purpose. The Court concluded that the statute had no secular legislative purpose and, therefore, was unconstitutional under criteria usually applied by the Court in Establishment Clause cases.[11]

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[6] Id. at 426.

[7] Id. at 429.

[8] 374 U.S. 203 (1963).

[9] Id. at 225.

[10] 449 U.S. 39 (1980) (per curiam).

[11] The Court utilizes a three-part test. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; third the statute must not foster excessive government entanglement with religion. Lemon v. Kurtzman, 403 U. S. 602, 612-613, (1971) (citations omitted). Cf. Larson v. Valente, 102 S.Ct. 1673 (1982).

What can be gleaned from these decisions is that the Court will hold unconstitutional any voluntary program of prayer or religious instruction in public elementary and secondary schools. Certainly this is the message that has been received by lower courts, as evidenced by recent decisions of which the following are typical.

In Lubbock Civil Liberties Union v. Lubbock Independent School District,[12] the court invalidated a policy of a public school board that permitted students to meet on the same basis as other groups for any educational, moral, religious, or ethical purpose. In Karen B. v. Treen,[13] a state statute allowed classroom teachers to permit students to offer a prayer, or to offer a prayer themselves if no student volunteered. The statute was held invalid even though no student could be required to participate or to be present during the time prayer was being offered. In Collins v. Chandler Unified School District,[14] the court found unconstitutional a practice in a public high school allowing a student to open student assemblies (attendance at which was voluntary) with a prayer. In Brandon v. Board of Education,[15] a public high school's refusal to permit a student group to pray in a classroom before school hours was found not to violate the group's free exercise or free speech rights, even though other student organizations were allowed to use school facilities.

C. Places Other Than Schools

The wedge driven between religious values and the public education of children is but part of relentless efforts by some to empty all our public institutions of any sense of religious values. These activities include efforts to exclude chaplains and prayer from state and national legislatures,[16] to remove religious Christmas displays from public places,[17] and to prevent religious leaders from conducting religious services on public property,[18]. The results in the adjudicated cases amply warrant the inclusion of public places other than schools in a constitutional amendment.

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[12] 669 F.2d 1038 (5th Cir. 1982), cert. denied, 103 S.Ct. 800 (1983).

[13] 653 F.2d 897 (5th Cir. 1981), aff'd mem., 102 S. Ct. 1267 (1982).

[14] 644 F.2d 759 (9th Cir. 1981), cert. denied, 454 U. S. 863 (1981).

[15] 635 F.2 971 (2nd Cir. 1980), cert. denied, 102 S.Ct., 970 (1981).

II. MISCONSTRUCTION OF THE ESTABLISHMENT CLAUSE

Careful scholarship reveals that the Establishment Clause was meant to foster religious liberty by preempting religious tyranny, not to erect a wall of separation which renders our public institutions inhospitable to religion and religious values. The results in cases such as McCollum, Engel and Schempp lack fidelity to the actual purpose of the Founding Fathers. Annexed as an Addendum to this memorandum is a portion (pages 7 to 26) of the brief amicus curiae which we filed in Mueller v. Allen now pending in the Supreme Court of the United States, No. 82-195. Those pages state succinctly the precise history and purpose of the Religion Clauses, and demonstrate the interpretational errors which have so significantly influenced the decisional law.

A constitutional amendment to overcome the effects of the cases discussed above is essential to keep faith with our forbears whose vision of the work of religion in our public institutions embraced a proper harmony and condemned only oppression. Indeed, the Establishment Clause cases in other areas of concern strongly suggest a need for a constitutional amendment which would revive entirely the authentic spirit and purpose of the Religion Clauses.

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[16] See Chambers v. March, 675 F.2 228 (8th Cir. 1982), cert. granted, No. 82-23, 103 S.Ct. 292 (1982); Murray v. Buchanan, No. 87-1301 (D.C. Cir. March 9, 1982).

[17] See Donnelly v. Lynch, 691 F.2d 1029 (1st Cir. 1982), cert. granted, No. 82-1256, 51 U.S.L.W. 3756 (1983); Citizens Concerned for Separation of Church and State v. City and County of Denver, 526 F. Supp. 1310 (D. Col. 1981).

[18] See O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979).

III. LEGAL EFFECT OF S.J. RES. 73

In essence, S.J. Res. 73 seeks to protect voluntary prayer in public schools and other public institutions from impingement by provisions of the Constitution, as construed by the courts. It does not, explicitly or by necessary implication, create a federal right to pray. In consequence, voluntary prayer in non-federal public places would be dependent upon the constitutional or statutory law of a state, subject to applicable federal constitutional guarantees (e.g., free speech and free exercise) whose probable effect is uncertain and cannot be adequately assessed in the absence of concrete circumstances. The legal situation with respect to prayer undoubtedly would vary among the several states, thereby creating diversity in an area of national, constitutional concern. Finally, S.J. Res. 73 does not, expressly or by necessary implication, extend its effect to religious instruction in public schools.

S.J.Res. 73 does not embody a policy which considers voluntary religious instruction in public schools a necessary concomitant to voluntary prayer in those schools. Such an objective would require a substantial modification, perhaps along the following lines:

> No person shall be denied the right voluntarily to engage in individual or group prayer, or to receive religious instruction provided by private auspices, in public places or institutions, including schools, of the several States or the United States.

In contrast to S.J. Res. 73, the foregoing does not explicitly prohibit compulsory participation. Such a provision seems superfluous because (a) the measure, limited to voluntary activities, could not reasonably be interpreted to authorize compulsory prayer or religious instruction, and (b) the First and Fourteenth Amendments already guard against compulsory participation in religious activities[19] or in activities contrary to one's religious beliefs.[20]

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[18] See O'Hair v. Andrus, 613 F.2d 931 (D.C. Cir. 1979).

[19] See Torcaso v. Watkins, 367 U. S. 488 (1961).

[20] See West Virginia v. Barnette, 319 U. S. 624 (1943).

ADDENDUM
to
Memorandum of Wilfred R. Caron
to Monsignor Hoye dated May 6, 1983.

The history which is most germane to the meaning of the Religion Clauses is the process of their evolution in the First Congress and the ensuing ratification process. Yet, because they were a product of reaction to the Constitution itself, it is necessary to begin at that threshold.

1. Constitutional Convention Of 1787 And Ratification By States

Religion was not a major concern of the Constitutional Convention of 1787. The only reference to religion in the proposed Constitution appeared in Article VI which provided, in part, that "no religious test shall ever be required as a qualification to any office or public trust under the United States."[9]

During the ratification process some states expressed concern because the Constitution did not explicitly protect the civil liberties of the people. New Hampshire, New York, North Carolina, Rhode Island and Virginia[10] specifically addressed the issue of religious freedom. The ratifying acts of four of them (New Hampshire excepted) addressed the issue of an established religion in terms of preferring one religion over others. Virginia proposed the following amendment on June 27, 1788:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of

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[9] V *Debates on the Adoption of the Federal Constitution* 564 (2d ed. J. Elliot ed. 1836).

[10] Of these states Rhode Island and New York did not make a recommendation for a religious amendment but each did include in its ratifying act a declaration of principles which included statements on religious liberty. *See* notes 12 and 13 *infra*.

> conscience, and *that no particular religious sect or society ought to be favored or established, by law, in preference to others.*[11] (Emphasis added.)

The scored language appeared in virtually identical form in the ratifying acts of New York,[12] Rhode Island,[13] and North Carolina.[14] Desirous of protecting its own religious establishment,[15] New Hampshire proposed an amendment reading: "Congress shall make no laws touching religion, or to infringe the rights of conscience."[16]

In contrast, there was substantial opinion that the explicit protection of religious liberty was unnecessary because the federal government lacked authority over religion, and because adequate protection was supplied by the ban on religious tests in Article VI and by the multiplicity of sects in the country. James Madison was among those who shared this view.[17]

2. Textual Development Of The Religion Clauses

The wording of the Religion Clauses was a compromise between the different texts finally approved by the House and Senate. The Religion Clauses evolved as follows:

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[11] III Elliot, *supra* note 9, at 659.

[12] I *id.* at 328.

[13] *Id.* at 334.

[14] IV *id.* at 244.

[15] *See* Corwin, *The Supreme Court As National School Board*, 14 Law and Contemporary Problems, 3, 11 (1949). New Hampshire's constitution on the date it ratified the Constitution contained a provision under which the legislature could authorize towns, corporate bodies, or religious societies to make provision at their own expense for the support and maintenance of public Protestant teachers of piety, religion and morality. N.H. Const. of 1784, Pt. I, Art. I, Section VI, 4 *American Charters, Constitutions and Organic Laws*— 1492-1908, 2454 (F. Thorpe ed. 1909).

[16] I Elliot, *supra* note 9, at 326.

[17] III *id.* at 330.

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HOUSE LANGUAGE

Madison's Proposal — June 8

The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.

Select Committee — July 18

No religion shall be established by law, nor shall the equal rights of conscience be infringed.

Livermore's Language — August 15

Congress shall make no laws touching religion, or infringing the rights of conscience.

Ames Language — August 20

Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.

Final Text — August 24

Congress shall make no law establishing religion or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.

SENATE LANGUAGE

September 3

Congress shall make no law establishing one religious sect or society in preference to others, nor shall the rights of conscience be infringed.

Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society.

Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.

Congress shall make no law establishing religion or prohibiting the free exercise thereof.

Final Text — September 9

Congress shall make no law establishing articles of faith or mode of worship or prohibiting the free exercise of religion . . . .

COMPROMISE

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof
> . . . .

Nothing in the House and Senate proceedings suggests that the thrust of the compromise differed in any material degree from the final House and Senate versions. It was directed against the preferment or establishment of religion.

3. The House Of Representatives

The major proceedings in the House took place on August 15, 1789, although final action did not occur until August 24th.

Madison Introduces First Version. The first version of the Religion Clauses was among a number of amendments to the Constitution proposed by Madison on June 8, 1789. It provided:

> The civil rights of none shall be abridged on account of religious belief or worship, *nor shall any national religion be established*, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.

1 *Annals of Congress* 434 (Gales & Seaton eds. 1789) (emphasis added). He advised that many doubted amendments to the Constitution were necessary to secure individual liberty. *Id.* at 432. He also stated the amendments would "not injure the Constitution," *id.*, and were "likely to meet the concurrence [of the states] required by the Constitution." *Id.* at 433.

Select Committee's Version. The amendments were referred to a Select Committee. Because of the diversity of views on religious liberty among the states, it is important to note the Committee consisted of one representative (including Madison) from each state. *Id.* at 665. The Committee reported language similar to that proposed by Madison regarding establishing religion except that the word "national" had been deleted.[18] Deletion of that word reflected a concern that the new government might be viewed as national rather than federal, with authority over state practices beyond its enumerated powers (discussed below at 23).

Madison Explains Intent. On August 15th the House considered the amendment reported by the Select Committee. Madison explained its meaning to be "that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 *Annals* at 730. He also observed that the amendment had been required by some state conventions which feared the Constitution might have given the Congress authority to make laws that "might infringe the rights of conscience and establish a national religion; to prevent these effects he presumed the amendment was intended." *Id.*

Concern Amendment Might Harm Religion. The language of the Select Committee's proposal ("No religion shall be established by law . . . .") evoked limited concern that it might be construed adversely to religion. Peter Sylvester of New York suggested the wording of the amendment "might be thought to have a tendency to abolish religion altogether." *Id.* at 729.[19] Benjamin Huntington of Connecticut agreed with Madison's statement of the intent, but he also expressed concern "that the words might be taken in such latitude as to be extremely harmful to the cause of religion." 1 *Annals* at 730. To illustrate, Huntington suggested the inability of a federal court to compel persons to support the religious societies to which they belonged, "for a support of ministers, or building of places of worship might be construed into a religious establishment."

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[18] National Archives and Records Service, *The Story of the Bill of Rights* 6 (1980).

[19] At least two commentators have concluded that Sylvester thought the language might be interpreted as forbidding all governmental assistance to religion. *See* W. Berns, *The First Amendment and the Future of American Democracy* 8 (1976); M. Malbin, *Religion and Politics—The Intention of the Authors of the First Amendment* 7 (1978).

Id. At the time, Connecticut authorized religious societies to tax their members for support.[20]

Madison Restates Intent. To assuage concerns such as those expressed by Sylvester and Huntington, Madison moved to insert the word "national" before religion which he thought "would point the amendment directly to the object it was intended to prevent." 1 *Annals* at 731. He "believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." *Id.*

Samuel Livermore of New Hamshire was not satisfied with Madison's motion but did not elaborate on his objections. *Id.* Elbridge Gerry of Massachusetts also objected to the insertion of the word "national." Gerry's discussion reflected concerns expressed by opponents of the Constitution in state ratifying conventions that the Constitution established a national government rather than a federal government. *Id.* Madison withdrew his motion, but denied insertion of the word "national" would imply the government was a national one. *Id.*[21]

Livermore's Amendment. Livermore moved to amend the language to read "that Congress shall make no laws touching religion, or infringing the rights of conscience." 1 *Annals* at 731. This proposal is identical, except for a stylistic change, to that recommended by New Hampshire when it ratified the Constitution, above at 8, and can be attributed to a desire to protect her own religious establishment.[22] Livermore's proposal, which passed on August 15 without any recorded debate, was not the language finally adopted by the House.

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[20] *See* I A. Stokes, *Church and State in the United States* 411-12 (1950).

[21] In the course of debate, Gerry had suggested that the amendment would "read better if it was that no religious doctrine shall be established by law." I *Annals* at 730. Roger Sherman of Connecticut thought the amendment unnecessary because Congress had no authority whatever delegated by the Constitution to make religious establishments. *Id.* Daniel Carroll of Maryland was in favor of the amendment because it would tend to conciliate the minds of those who felt the rights of conscience were not well secured under the Constitution. *Id.*

[22] Corwin, *supra* note 15.

Final House Text. On August 20th the House passed the motion of Fisher Ames of Massachusetts (the last state to abandon an established religion in 1833) to change the wording to "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." 1 *Annals* at 765. With minor stylistic changes, it was ultimately sent to the Senate on August 24th. *Id.* at 778. The *Annals of Congress* do not record the debate, if any, on the Ames wording.

Insofar as establishment is concerned, the Ames and House versions are indistinguishable in substance from that proposed by the Select Committee. Madison's explanations of intent give importance to this fact.

4. The Senate

On September 3rd the Senate twice agreed to amend the language approved by the House. First, it approved this language: "Congress shall make no law establishing one religious sect or society in preference to others, nor shall the rights of conscience be infringed."[23] The Senate then rejected two other versions of the amendment[24] and a motion that the entire amendment be stricken. I DePauw, *supra* note 23, at 151. The Senate finally approved: "Congress shall make no law establishing religion or prohibiting the free exercise thereof." *Id.*

On September 9th the Senate passed its final version, to which it added other guarantees of liberty (free speech, free press, peaceable assembly and petition). The Religion Clauses read: "Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion . . . ." *Id.* at 166. There are no records of the debates in the Senate.

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[23] I *Documentary History of the First Federal Congress of the United States* 151 (L. DePauw ed. 1972).

[24] The rejected versions were (i) "Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society," and (ii) "Congress shall make no law establishing any particular denomina-

5. Ratification By The States

The Bill of Rights was ratified by the states with a notable lack of comment on the First Amendment.[25] Only in the Virginia Senate was concern expressed that the First Amendment was not broad enough to prevent preferential treatment among religions (discussed below at 18).

C. DIVERSITY OF RELIGIOUS PRACTICES AMONG THE STATES—VIRGINIA ATYPICAL

The Religion Clauses were molded to meet the needs and wishes not only of the people of Virginia, but of all the states. Their views and sentiments on the appropriate relation of government to religion varied greatly. The undue influence of Virginia's disestablishment history on Establishment Clause law (discussed below at 16-21) requires a sharp focus on the great diversity of religious practice among the states.

The panorama of opinion on church-state relations found expression in the laws of the states, as succintly catalogued by Sanford H. Cobb:

> Two out of thirteen, Virginia and Rhode Island, conceded full freedom; [o]ne, New York, gave full freedom except for requiring naturalized citizens to abjure foreign allegiance and subjection in all matters ecclesiastical and civil; [s]ix, New Hampshire, Connecticut, New Jersey, Georgia, North and South Carolina, adhered to religious establishment; [t]wo, Delaware and Maryland, demanded christianity; [f]our, Pennsylvania, Delaware, North and South Carolina, required assent to the divine inspiration of the Bible; [t]wo, Pennsylvania and South Carolina, imposed a belief in heaven and hell; [t]hree, New York, Maryland, and South Carolina, excluded ministers from civil office; [t]wo, Pennsylvania and South Carolina, emphasized belief in one eternal God; [o]ne, Delaware, required assent to the doctrine of the Trinity; [f]ive, New

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tion of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed." *Id.*

[25] C. Antieau, A. Downey, E. Roberts, *Freedom From Federal Establishment* 157 (1963).

> Hampshire, Massachusetts, Connecticut, Maryland, and South Carolina, insisted on Protestantism; [o]ne, South Carolina, still referred to religious 'toleration'.[26]

In their practices as well, states varied. For instance, while Virginia prohibited obligatory support of any religious place or ministry,[27] states such as Connecticut, Maryland, New Jersey, North Carolina, Pennsylvania, and Georgia recognized a right to refrain from taxation for the support of a church other than one's own, but permitted taxation for the support of a church which one had joined.[28] Massachusetts and New Hampshire empowered the legislatures to authorize towns and religious societies to provide for the support of public Protestant teachers of piety, religion, and morality, although certificates of dissent directing tax support to one's own church were permitted to be filed.[29]

Virginia opposed incorporation of churches, while Delaware, New Jersey, and Pennsylvania permitted incorporation. Maryland permitted incorporation but was reluctant to grant corporate status in practice. South Carolina opposed incorporation for dissenting churches. New Hampshire approved incorporation for all, but in practice favored the Congregational church.[30]

It thus is evident that the great number of people who ratified the First Amendment in the states did not share a church-state tradition in common with Virginia or each other. Rather, the experience of Virginia was unique to most early Americans. It cannot reasonably be presumed to have been the desired prototype of a people who with deliberation selected very different models of church-state accommodation. The First Amendment, ratified by representatives and conventions of eleven states, was the product of all these models.

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[26] I A. Stokes, *supra* note 20, at 444, citing S. Cobb, *The Rise of Religious Liberty in America* 507 (1902).

[27] *Sources and Documents Illustrating the American Revolution* 207 (2d ed. S. Morison ed. 1929).

[28] Antieau, *supra* note 25, at 36-38.

[29] I Stokes, *supra* note 20, at 424, 429.

[30] Antieau, *supra* note 25, at 82-86.

D. THE UNDUE INFLUENCE OF VIRGINIA'S HISTORY UNDER *EVERSON*

The interpretative importance of the generative history of the Establishment Clause was effectively blunted by its omission from consideration in *Everson*, the very threshold of Establishment Clause analysis.

The briefs in *Everson* did not treat the House and Senate proceedings. The principal historical discussion is found in the brief filed by the American Civil Liberties Union which concentrated on Virginia disestablishment history as it was recounted in the early free exercise polygamy case of *Reynolds* v. *United States*, 98 U.S. 145 (1879). Drawing on *Reynolds*, *Everson* tied its conclusions to Virginia history as it is revealed by the Virginia Bill for Religious Liberty, Madison's "Memorial and Remonstrance Against Religious Assessments," and Jefferson's "wall of separation" letter to the Danbury Baptists. The overriding importance attached to this history has been noted in subsequent cases.[31]

Everson's sweeping assertions against aid to religion, restated a year later in *McCollum* v. *Board of Education*, 333 U.S. 203, 210-11 (1948), have since been qualified. *See Walz* v. *Tax Commission*, 397 U.S. at 668; *Board of Education* v. *Allen*, 392 U.S. 236, 250-51 (1968) (Black, J., dissenting). However, they severely restricted the interpretative value of the precise generative history when it was discussed fourteen years later in *McGowan* v. *Maryland*, 366 U.S. 420, 440-42

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[31] *See Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. at 770; *Braunfeld* v. *Brown*, 366 U.S. 599, 602 (1961); *McGowan* v. *Maryland*, 366 U.S. 420, 437 (1961).

(1961). Although that history was fully briefed in *McCollum*,[32] it was not discussed in the majority opinion by Justice Black who had also authored the *Everson* opinion.

Although the Virginia experience is assuredly a relevant part of a balanced historical analysis, it has unduly influenced analysis in Establishment Clause cases. The *Everson* opinion could have given more effect to its observation (330 U.S. at 11) that the meaning of the Religion Clauses cannot be derived solely from the experience of any one colonial group or locale. The discussion which follows further assesses the probative value of Virginia history.

1. Virginia Bill For Religious Liberty.

Everson suggested that the Religion Clauses were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia Bill for Religious Liberty enacted in 1786 ("Virginia Bill"). *Everson* v. *Board of Education*, 330 U.S. at 13. However, the operative language of the Virginia Bill reveals the difficulty with this view:

> That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief. . . .

Id. This Bill differed greatly (a) from that which Virginia recommended two years later as an amendment to the Constitution, (b) from that which Madison proposed, and (c) from that which was finally included in the Establishment Clause. The history already discussed makes clear that a number of states would not have agreed to an amendment with the breadth of the Virginia Bill.

To the extent Virginia's estimate of *federal* establishment needs is relevant, no source is more conclusive than the amendment it proposed when it ratified the Constitution. Quoted in full above at 7-8, it bears restatement here:

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[32] Brief for Appellees, *McCollum* v. *Board of Education*, 333 U.S. 203 (1948).

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and *that no particular religious sect or society ought to be favored or established, by law, in preference to others.*[33] (Emphasis added.)

Virginia appreciated the very real difference between attending to its own concerns, and those of the federal government in its relations with all the states.

Finally, although its concerns seem unfounded in retrospect, on December 12, 1789 the Virginia Senate expressed grave disappointment over the First Amendement (then the third). Its recorded sentiments concluded that, in all respects including the Religion Clauses, the First Amendment "will be found totally inadequate, and betrays an unreasonable, unjustifiable, but a studied departure from the Amendment proposed by Virginia."[34] The eleventh and last state necessary for ratification, Virginia postponed its acceptance until December 15, 1791, two years later.

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[33] III Elliot, *supra* note 9, at 659.

[34] The 3d amendment, recommended by Congress does not prohibit the rights of conscience from being violated or infringed; and although it goes to restrain Congress from passing laws establishing any national religion, they might, notwithstanding, levy taxes to any amount, for the support of religion or its preachers; and any particular denomination of christians might be so favored and supported by the General Government, as to give it a decided advantage over others, and in the process of time render it as powerful and dangerous as if it was established as the national religion of the country.

This amendment then, when considered as it relates to any of the rights it is pretended to secure, will be found totally inadequate, and *betrays an unreasonable, unjustifiable, but a studied departure from the Amendment proposed by Virginia* and other states, for the protection of these rights. Journal of the Senate of the Commonwealth of Virginia, 1785-1790, at 62-63 (1828) (emphasis added).

The point here is not substantive, but only that it is imprecise to consider the Religion Clauses as the embodiment of the spirit and accent of the Virginia Bill.

2. Madison's Memorial And Remonstrance Against Religious Assessments

Madison's Memorial must be assessed in context. It was written four years before the Religion Clauses were hammered out. His purpose was to oppose A Bill Establishing A Provision for Teachers of the Christian Religion ("Bill") pending before the Virginia Assembly.[35] It was "an impassioned reaction," *Flast* v. *Cohen*, 392 U.S. 83, 104 n.24 (1968), to a bill intended to impose a tax for the support of ministers at a time when Virginia was in the last stages of established Anglicanism. The Memorial itself indicates that Madison's concept of an established religion was one that enjoyed a preferred status and to which others might be obliged to conform.[36] Madison's opposition to the Bill accords with his stated understanding of the meaning of the Establishment Clause, discussed above at 11-12. It would seem futile to attempt to contradict or vary that understanding by reference to his Memorial.

As demonstrated, the Religion Clauses were the result of a political process which, typically, produced compromise. The Memorial cannot be considered as Establishment Clause bedrock anymore than the Virginia Bill can be so viewed.

3. Wall Of Separation - Jefferson's Metaphor

Thomas Jefferson was in France when the Religion Clauses were developed, debated and adopted.[37] Thirteen years later he employed the "wall of separation" metaphor when he declined a request of the Danbury Baptist Association to proclaim a day of fast and prayer in thanksgiving.[38] His refusal may be contrasted with President Washington's proclamation of a day of public thanksgiving and prayer,[39] pursuant to the House's resolution one day after Congress approved the text of the Religion Clauses, 1 *Annals* at 914-15, and with this Court's views in *Zorach* v. *Clauson*, 343 U.S. 306, 313 (1952). Like Madison's Memorial, Jefferson's metaphor should not be put in service of objectives beyond its purpose and intent. The principle he was expounding was government's lack of authority over religious practice or belief. *Reynolds* v. *United States*, 98 U.S. at 164. The hazard of undue reliance on Jefferson's metaphor becomes more apparent when it is considered in light of his demonstrated church-state philosophy.

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[35] Both the Bill and Madison's Memorial are appended to Justice Rutledge's dissenting opinion in *Everson*, 330 U.S. at 63-74.

[36] *See* Corwin, *supra* note 15, at 10.

[37] I. Cornelison, *The Relation of Religion to Civil Government in The United States* 93-94 (1895).

In 1803, Jefferson submitted for Senate approval a treaty with the Kaskaskia Indians that provided for an annual payment, for seven years, of one hundred dollars for the support of a Catholic priest and a single payment of three hundred dollars to assist in the building of a church.[40] On three occasions Jefferson extended a 1796 act which had authorized the issuance of patents, without payment, for three tracts of land to the Society of the United Brethren for propagating the Gospel among the Heathen.[41] Jefferson was President when tax exemption was first given churches in Washington by Congress. *Walz* v. *Tax Commission*, 397 U.S. at 684 (Brennan, J., concurring). Jefferson had recommended that the various religious sects be allowed to establish schools of theology on the confines of Virginia's public university.[42] Finally, on May 15, 1804, Jefferson wrote to The Ursulines of New Orleans, a Catholic religious order of nuns. Responding to their request for assurance of the continued operation of an orphanage, President Jefferson stated: "[T]he charitable objects of your institution cannot be indifferent to any; and it's [*sic*] furtherance of the wholesome purposes of society, by training of it's [*sic*] younger members in the way they should go, cannot fail to ensure it the patronage of the government it is under. Be assured it will meet all the protection which my office can give it."[43] The texts of Jefferson's and The Ursulines' letters are appended.

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[38] "I contemplate with sovereign reverence that act of the whole American people which declared that their Legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof," thus building a wall of separation between Church and State." *Reynolds* v. *United States*, 98 U.S. at 164.

[39] *See* I Stokes, *supra* note 20, at 487-88.

[40] R. Cord, *Separation of Church and State: Historical Fact and Current Fiction* 261-63 (1982).

[41] *Id.* at 41-46.

[42] *See McCollum*, 333 U.S. at 245-46 (Reed, J., dissenting).

If one should look to Jefferson, his actions are far more meaningful than his metaphor.

E. ESTABLISHMENT CLAUSE ANALYSIS WITHIN FRAMEWORK OF ESSENTIAL JUDICIAL PRINCIPLES AND GERMANE HISTORY

Before undertaking the necessary analysis, it is useful to establish the essential contours of the decisional context which it is meant to serve.

The Fourteenth Amendment makes the Religion Clauses applicable to the states. *Everson* v. *Board of Education*, 330 U.S. at 8. Although the "clearest command of the Establishment Clause is that one religious denomination cannot be preferred over another," *Larson* v. *Valente*, 102 S.Ct. 1673, 1683 (1982), its reach embraces certain acts and practices which do not themselves constitute a formal establishment or preferment of a religion or religions. *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 216 (1963); *McGowan* v. *Maryland*, 366 U.S. at 442; *Everson* v. *Board of Education*, 330 U.S. at 15-16. Yet an hermetic separation of church and state is not required. *Roemer* v. *Board of Public Works*, 426 U.S. 736, 746 (1976); *Lemon* v. *Kurtzman*, 403 U.S. 602, 614

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[43] *See* I Stokes, *supra* note 20, at 677. The original of Jefferson's letter is located in the archives of the Ursuline Academy, 2635 State Street, New Orleans, Louisiana, 70118.

(1971). There is ample room in society for government's benevolent accomomodation of religion which "derives from an accommodation of the Establishment and Free Exercise Clauses." *Walz* v. *Tax Commission*, 397 U.S. at 669-70. That benevolence may not go so far as to jeopardize the fundamental objectives of the Establishment Clause, but there is no transgression merely because aid may free the recipient "to spend its other resources on religious ends." *Committee for Public Education, Etc.* v. *Regan*, 444 U.S. at 658; *Hunt* v. *McNair*, 413 U.S. 734, 743 (1973); *see also Roemer* v. *Board of Public Works*, 426 U.S. at 747.

For present analytical purposes, there is no more useful framework than this statement of the Chief Justice in *Walz:*

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

397 U.S. at 669. This states precisely the two levels of operative principle, namely, the immutable and inviolable constitutional precepts against establishment or preferment, and ancillary principles whose implication is necessary to preserve those precepts. The principles which determine the zone of impermissible governmental action should derive their substance from the explicit Establishment Clause objectives.

1. Establishment Clause Language

Whatever may be said of the clarity of the Establishment Clause considered *in vacuo*, its precise meaning emerges when the words are illumined by the process which forged them. The language purposefully and precisely effectuates the readily identifiable objectives of its framers. Had the Establishment segment of the Religion Clauses emerged in the versions previously considered in House and Senate, there would be no doubt that its objectives were the actual establishment or preference of one or more religions. That was the precise concern of four of the five states which requested such an amendment when they ratified the Constitution. That was the precise objective stated and restated by Madison as sponsor in the House.

There was no tension or doubt related to these objectives, but the choice of words to reach them did engender certain anxieties born of other concerns. References to "national" religion evoked fears of an implication that the new government would be "national" and not "federal." However, more important for present purposes was the concern that the Religion Clauses might interfere with the autonomy of the states in religious matters, particularly the states which still countenanced preferred religion to one degree or another. Except for Madison, the most active participants in the House debate (Gerry, Huntington, and Livermore) came from states (Connecticut, Massachusetts, and New Hampshire) that maintained a religious establishment in one form or another. More than one commentator has noted the importance of the national-state issue to the development of the Establishment Clause.[44]

As noted, the Religion Clauses are a House-Senate compromise. The task was to agree on language that would meet the major objectives of the recommending states as described by Madison, but which would respect the concerns of his peers. The language finally selected accomplishes these objectives in a skillful manner and becomes quite unambiguous in light of the concrete realities. The phrase "respecting an establishment" had two jobs to do, *i.e.*, prevent Congress from establishing or favoring a national religion, and prevent Congress from interfering with state religious practices. It did both well, and only violence to its purpose can ensue if suggestions of basic ambiguity are allowed to force other basic objectives upon the Establishment Clause.

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[44] *See* Corwin, *supra* note 15, at 10; Malbin, *supra* note 19, at 17; J. Story, *Commentaries on the Constitution of the United States* 731 (1833).

The phrase "respecting an establishment" cannot reasonably be read to mean concerning or touching upon religion. Indeed, that was the terminology of Livermore's proposal which was eventually rejected. The word "establish," or its derivatives, was consistently used to refer to preferred religions in the amendments recommended by the states, by Madison in the House debate, and in versions of the measure in both House and Senate. There is nothing in the records of the First Congress to indicate that the use of the word "respecting" was intended to expand the meaning of "an establishment of religion" or the scope of the Clause. As noted, the use of "respecting" made clear that Congress was also prohibited from passing laws affecting state establishments.[45]

The language of the Clause does not concern itself with religion in general but with the particular problem of *an establishment* of religion. There was no concern expressed during the August 15 debate that Congress might enact a law beneficial to religion or religious institutions. Such benevolence was not perceived as an evil. Had this been the concern it could have been dealt with simply by providing that "Congress shall make no law respecting religion" without introducing the more limited concept of "an establishment of religion."

It has been observed that if the authors of the Establishment Clause intended only the objective of prohibiting preferred or established religion, they could have simply so provided rather than choose the language they did. *Lemon* v. *Kurtzman*, 403 U.S. at 612. However, as demonstrated, such terminology was rejected by the First Congress for the reasons assigned. This *amicus* respectfully submits that the Establishment Clause is clearer than as perceived in *McGowan*, 366 U.S. at 441-42, and a few other cases[46] under the influence of *Everson*.

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[45] Malbin, *supra* note 19, at 16.

[46] The language has been referred to as "opaque," *Lemon* v. *Kurtzman*, 403 U.S. at 612; and as "sparse," *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. at 820 (White, J., dissenting).

2. Establishment And Religious Liberty

The Establishment Clause is part of the Bill of Rights. The canon *ejusdem generis* suggests, and the history of the Religion Clauses requires, that the Establishment Clause be viewed as a means for protecting individual liberty. *See* Madison's explanation of intent, above at 11. Especially is this so under the Fourteenth Amendment which applies the Establishment Clause to the states. That Clause was not meant to drive a wedge between church and state, but rather to avoid those relationships between the two which pose a realistic threat of impairing religious freedom.

The Establishment Clause has a functional relationship to religious liberty. As the Court has noted, it reflects the experience of its framers that officially preferred or established religion generates religious intolerance and persecution. *School District of Abington Township* v. *Schempp*, 374 U.S. at 221-22; *Engel* v. *Vitale*, 370 U.S. at 430-32; *Torcaso* v. *Watkins*, 367 U.S. 488, 490 (1961). Both components of the Religion Clauses were meant to work to the same end. If the Establishment component is applied to reach results which cannot be justified in terms of religious liberty, it fails in fidelity to the intended constitutional purpose. This is certainly the case when it is used to invalidate governmental accommodation of activities of religious institutions which serve the public interest and which pose not the remotest threat to religious freedom.

3. Analytical Impact Of Everson

To the precise objectives of the Establishment Clause, the opinion in *Everson* engrafted a third couched in terms of aid to religion. This is the root of the difficulty, for by so doing this mode of governmental accommodation was rendered opprobrious and was reduced to the level of inherent constitutional vice. The abiding effect is the anguished tension between the common sense and tradition of benevolent neutrality, and the demands of a rule which seems to frustrate more than Establishment Clause objectives could reasonably require. Thus we have witnessed the invalidation of such benign legislative accommodations as the loan of maps and the payment for costs of field trips to governmental and cultural centers. *Wolman* v. *Walter*, 433 U.S. 229, 248-55 (1977).

In *Walz* the Court noted that "for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." 397 U.S. at 668. The presence of any of these elements raises a concern, as observed in *Tilton* v. *Richardson*, 403 U.S. 672, 677 (1971). However, whether a particular instance of aid must be nullified calls for a value judgment which must "turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." *Walz* v. *Tax Commission*, 397 U.S. at 669.

REMEDYING THE TRAGIC LOSS OF PRAYER AND RELIGION IN THE PUBLIC SCHOOLS

statement to the Senate Judiciary Subcommittee on the Constitution
on S.J. Res. 73, "The School Prayer Amendment"
submitted on May 16, 1983, for the record
by
Willel W.G. Reitzer
private citizen, Washington, D.C.

Religion in the public schools has been a major interest of mine for two decades. I have researched material for a full-length book, which is in advanced draft form. In addition, I have written essays on numerous contemporary issues. Because two are pertinent here, I append them to this statement: "The Fatal Defect In Public Education" on secular education in general and "Praying Always With All Prayer and Supplication In the Spirit" on prayer in general. I am also putting together a book on the Ten Commandments. This school prayer issue I approach from five aspects: the theological, the legal-historical, the practical, the socio-political, and the educational-historical. I offer a synopsis by way of background, followed by a conclusion that goes to the proposed legislation itself.

BACKGROUND

I. Theological. Too many people fail to see a need for school-opening exercises based on prayer--much less, Bible-reading. And many who do, do not see why prayer cannot be offered at home. These people seem oblivious to why those exercises ever got started in the first place. But Holy Scripture states: "In everything by prayer and supplication let your requests be made known unto God" (Phil.4:6). In early American history, Bible believers took that literally. And rightly so. Thus not only schools opened with prayer, but also church meetings, business meetings, town meetings, court sessions, family outings, community doings, festive occasions. Even major international activities opened solemnly. The 1783 Treaty of Paris began: "In the Name of the Most Holy and Undivided Trinity."

To get around the problem that opening prayers might be too sectarian--too confined to the distinctives of a particular sect--some school boards stipulated that only the Lord's Prayer be said. But in time people objected even to that. And then they objected to saying grace at mealtimes. And now they object to any religion in the schools--or in public life whatever.

It is true, prayer rates as a most meaningful practice, and, yes, it has its prerequisites, preliminaries, and particulars in order to be most effective. Yet, even when religious leaders offer prayer, there remains considerable error in attitude, motive, form, and content--from a general perspective. So whenever prayer is made in a group setting, there has to be a large degree of tolerance. The point not to be lost sight of is: prayer is essential. It is essential to EVERYTHING. And it should be made immediately prior to the activity about to take place--not earlier at some other location. The author attended two theological seminaries where prayer opened each class period.

II. Legal-Historical. The most far-reaching legal change on this issue was the 1962/63 Supreme Court decisions removing the long-existing prayer and Bible-reading opening exercises from the public schools, and imposing on them a policy of religious neutrality. Involved were four legal issues: i) whether the Supreme Court had jurisdiction, ii) whether complainants had the right to sue, iii) whether the First Amendment establishment clause had been violated, and iv) whether the practices were outside the people's free exercise of religion guaranteed by the First Amendment. To each the Supreme Court said yes. But the author--and others--put forward a good case the Court erred each time.

The key point is that neither the framers of the First Amendment nor the people generally, then or since, envisioned such far-reaching restrictions--as evidenced by the fact prayer (and Bible use) in public school opening exercises continued many, many years unhampered.

For a fact, the Colonists foresaw the problems of religious pluralism in society clearly, and enacted laws putting various restrictions on nonconformists in their midst. But the nonconformists complained loudly of intolerance. So in time Toleration Acts were passed to permit nonconformists to worship differently within the community. But the nonconformists soon were not satisfied with that concession. They began to object to public religious practices they disagreed with--again from the basic standpoint of unfairness. They complained the traditional practices singled out their children as different, thereby causing serious trauma. Some then have become so bold as to complain that the traditional practices are offensive to them--objecting not only to prayers in the name of Jesus Christ, but to crosses, and creches, and everything Christian.

Actually, it is almost impossible for public school pupils to keep their religious identity undisclosed. There are religious holidays, Sabbath days, funerals, and other functions that require school absence. There are special dietary rules, dress requirements, and other religious distinctives. Besides, is it not hypocritical--even in the face of possible adverse reaction from other pupils--to seek to hide religious identity?

We have come to the point where everything is permitted in the public schools except viewpoint and practices and group activities that have a religious basis. It has become necessary for Senators to sponsor legislation giving students "equal access" to public schools in order to meet for religious purposes. Thus, the people who founded this nation on Biblical principles, but who tolerantly let nonconformists stay in their midst, discovered that the latter were taking their Constitution and by legal cunning doing away with one essential after another to their general way of life.

Someday the Supreme Court may rectify the school prayer decision. In the meantime several avenues are available to attain the same result. This I call the practical aspect.

III. Practical. i) Congress could remove Supreme Court appellate jurisdiction so that individual States would have final authority in this matter; ii) the Constitution could be amended: a) by a "Prayer Amendment" that would guarantee prayer in public schools--in one form or another, or b) a stronger amendment that would declare such prayer and Bible use as existed at the time of the enactment of the First Amendment not to be a violation thereof; or c) a still stronger amendment, called the Christian Amendment (which has been proposed at times in the past), that would make Biblical principles part of the law of the land; iii) abandoning the public schools and instituting private schools where beliefs can be practiced beyond court interference.

IV. Socio-political. Which option will be put into effect depends, of course, on the socio-political pressures that prevail. A number of people like the status quo. They resist any change. They argue: "Don't tamper with the Constitution." But that is a self-serving argument without merit. In fact, it is duplicitous. For it was the Supreme Court that tampered with the Constitution by reading into it prohibitions that were not there. Now they use the "don't tamper" argument to sanctify the error.

In a democracy the MAJORITY is supposed to rule. Judging from all the polls taken, it appears a large majority of citizens favors school opening prayer periods. But minorities have a way of raising obstacles, sometimes very cleverly, that effectively frustrate the majority will. One series of argument is that the exercises consist of a form of religious indoctrination, coercion, and discrimination. But as the late Mr. Justice Felix Frankfurter of the Supreme Court observed: "To deny the political power of the majority to enact law concerned with civil matters, simply because they may offend the consciences of a minority, really means that the consciences of a minority are more sacred and more enshrined in the Constitution than the consciences of a majority" (W.Va. v. Barnette, 1943). That rationale applies in religious matters as well. Religious nuetrality is a fiction: in essential areas it favors some while denying others.

Admittedly, the will of the people is difficult to establish. What is deplorable, however, is the sleight of hand that too many outfits are using to slant the outcome of polls in the direction they desire, such as by prejudicial formulation of questions. Even religious organizations are prone to this: through stacked resolutions committees, railroading voting procedures, and biased reporting. Thus "official" resolutions give no real indication of the convictions of the constituency, no careful poll having been taken in advance. Moreover, often the resolutions are too wordy, too broad, too narrow, too vague, too confusing to be sufficiently enlightening per se. Nevertheless, if democracy is our form of government, the will of the majority ought to be ascertained--and obeyed.

V. Educational-historical. Historian Robert Baird called the Colonial Period, when prayer and Bible in education and public life were most in evidence, America's "golden age". Their gradual removal has contributed to the gradual decline in educational achievement and national well-being, And it keeps accelerating, because of the mushrooming spiritual void in national life. All human history proves that national peace and prosperity are in direct proportion to a nation's adherence to Biblical doctrines, morals, services to God and humanity, and piety.

One must not be misled by the false signs of advancement. Although the populace is relatively better off materially, this is predominantly due to deficit financing--which also keeps accelerating. We are better off health-wise, but working less, producing less, and dipping into the federal treasury more to finance health care. We see astonishing technical progress, but overall less competency to keep up with it.

~~If~~ When we take the Ten Commandments as a guide, we find less commitment to each one of them. There is less knowledge of and devotion to God (and correspondingly more profanity, irreverence, and blasphemy). There is less observance of the Sabbath Day. There is less respect for parents, for marital vows, for government leaders, for teachers, for the police, for neighbors. There is less respect for sex, for property, for truth. There is less rightful desire, less noble aspiration, less real contentment, less genuine thankfulness. And less respect for health and life.

We keep looking at the continual decline in education in the last 20 years as if the public schools were great at the start of that sharp decline. The fact is the schools had already attained a deplorable state long before then.

CONCLUSION

The restoration of school opening exercises--even with real prayer (not to mention Bible-reading) --will only be like an ounce of blood for a sick patient that needs a complete transfusion. And any opening exercise less than this will be that much less worthwhile.

Further, should a legal remedy be adopted that would permit even a potent school opening exercise, I fear it may do more damage by raising false hopes and by slackening efforts toward more far-reaching remedies, because the public schools would still have little vitality in them. I'm surprised so many Bible-believing individuals still do not see this. For every subject is infused with Biblical principles, which cannot be separated out.

Scripture clearly states children are to be reared "in the instruction and discipline OF THE LORD" (Eph.6:4). Thus, conscientious parents must establish schools where this can be done. And God certainly will enable them to do it--even in the face of inflation/recession, high taxes, and no tax breaks for not sending their children to the public schools.

Universal Christian Publications
P.O. Box 2020
Washington, D.C. 20013

STATEMENT TO: SENATE JUDICIARY COMMITTEE

SUBJECT: S.815, S.425, S.1059. EQUAL ACCESS

BY: THE UNITARIAN UNIVERSALIST ASSOCIATION OF CHURCHES
OF NORTH AMERICA (UUA)
THE AMERICAN HUMANIST ASSOCIATION (AHA)
THE COUNCIL FOR DEMOCRATIC AND SECULAR HUMANISM (CODESH)
THE VOICE OF REASON (VOR)

PRESENTED BY: EDD DOERR, EXECUTIVE DIRECTOR, THE VOICE OF
REASON (Box 6656, Silver Spring, MD 20906. 598-2447)

MAY 4, 1983

Mr Chairman and Members of the Committee

The Unitarian Universalist Association of Churches of North America (UUA), the American Humanist Association (AHA), the Council for Democratic and Secular Humanism (CODESH), and The Voice of Reason (VOR), while generally favoring the concept of equal access in principle, would like to register opposition to the equal access bills as written and also to suggest that the problem which the bills address could best be solved by the ingenuity of local school districts without assistance from Congress.

The UUA, with 175,000 members and over 1,000 congregations in the U.S., has a long history in our country, going back at least as far as the American Revolution. Indeed, the church of the Pilgrims in Plymouth, Massachusetts, formed in England before their departure for the New World in the Mayflower, is a Unitarian Universalist church. The UUA has long supported religious liberty and the constitutional principle of separation of church and state. At its annual General Assembly in June 1982 the more than 2,000 delegates voted almost unanimously for a resolution reaffirming support for church-state separation and specifically supporting the religious neutrality of public education. Prior to the General Assembly, that resolution was voted the highest priority in a poll of all Unitarian Universalist congregations (the parish poll).

The AHA and the CODESH are smaller associations of religious liberals who also strongly support religious liberty, church-state separation, and the respectful neutrality of public schools toward all religions. VOR is an interfaith organization dedicated to defending religious liberty and church-state separation.

The Lubbock and Brandon rulings, to which the equal access bills are responses, did not close the door on students discussion of religion in school. At lunch, before and after classes, and during recesses students enjoy the right to discuss anything, including religion. Religion is appropriately discussed in the academic atmosphere of history, English, art, music, and other classes. If a school has a policy of allowing all groups of students without exception to meet in school during free time, a truly open forum policy, then students could meet to discuss religion. Denial of that right could be adjudicated, as occurred in the Widmar case. No federal legislation should be needed to secure equal access.

Of the proposed bills, Sen. Hatfield's S.815 is the best because it applies only to secondary schools and utilizes the courts for remedies. But even it does not address itself to the following questions: Would student initiated discussion, prayer, or Bible study groups be allowed to bring in adult clergy or other leaders? In hundreds of communities across the country, certain fundamentalist groups have been allowed free access to to public schools for the purpose of proselytizing. Wouldn't the proposed legislation tend to favor more aggressive, evangelistic, proselytizing groups over those which are more sensitive to the religious pluralism of our schools? Would adult-trained student religious leaders be able to turn public schools into arenas for proselytizing and sectarian competition? Would newer religions, often pejoratively called "cults", be allowed equal footing with more traditional groups?

Sen. Denton's bills, S.425 and S.1059, extend the equal access principle to elementary schools and -- apparently, though the language of the bills is not clear -- to mixed groups of students and teachers. Elementary students are too young and too impressionable not to be under careful supervision in school by competent school personnel. The kind of supervision of student initiated religious groups required by the nature of elementary schools and students aged 6 to 13 would certainly be the kind of school sponsorship of religious activity which the courts would find incompatible with the First Amendment. Parents have the primary responsibility for the religious developement of their children and most would be quite upset if their elementary children came home from school converted to another religion.

The Denton bills would also seem to allow mixed religious groups of students and teachers. It is hard to see how such arrangements would not have the appearance, if not the reality, of impermissible school sponsorship. Further, group meetings of students, or teachers, or students and teachers, could easily have the effects of calling attention to religious differences and of creating divisions among students and among faculty along religious lines. Such divisions could well disrupt the smooth running of the academic enterprise.

Congressional action, either on the Hatfield or the Denton model, would be a disproportionate and excessively far reaching response to the problems perceived by some in the wake of the Brandon and Lubbock cases. We believe that the elected boards and administrators of our 16,000 local public school districts have the ingenuity and the knowledge of local situations needed to resolve any perceived local equal access problems, subject of course to court test. We therefore urge that the Senate allow local school districts to deal with these problems. Too little time has elapsed since Lubbock to permit Congress or anyone else to assess its effects. Haste in this matter could lead to more serious problems of government involvement with religion than presently exist.

American Atheists
2210 HANCOCK DRIVE • AUSTIN, TEXAS • (512) 458-1244

5th May, 1983

Senator Orrin G. Hatch
125 Russell Senate Office Bldg.
Washington, D.C. 20510

Dear Senator Hatch:

American Atheists is a non-profit, non-political, educational organization dedicated to the complete and absolute separation of state and church. It functions as a watchdog organization to protect the civil libertarian rights of American Atheists and to monitor federal, state, county and local governments in respect to breaches in what Thomas Jefferson envisaged as "the wall of separation between state and church," which he described the First Amendment as protecting.

The media has reported that the Constitution Subcommittee of the Judiciary Committee of the Senate has just concluded the third day of hearings on a proposed Constitutional Amendment which would permit "voluntary" prayer in the public schools of our nation. This is a formal request that our organization should be one of those listed to be notified for input into such hearings in the future.

Since we were not apprised of the proposed hearings this letter is a statement which we desire to have included in the official transcript. Also, we desire a copy of the transcript of the three day hearing. Please notify us of the cost of the same.

I am the founder of American Atheists and it was my family which was involved in the original court decisions, Murray v. Curlett and Abington Sch. Dist. v. Schempp which removed bible reading/prayer recitation from the public schools in June, 1963.

MAY 9 AM 10 00

Individual, voluntary, prayer was not then, nor has it ever been prohibited in any public school of our nation. Any child may, anywhere in school, at any time, bow his/her head and pray. The fundamentalists of our nation, are not interested in such free, individual, voluntary prayer. What they desire is government endorsed prayer, administrated by and through the public schools, where attendance is mandatory and the institutions are tax supported. This speaks to the failure of religions in the United States to capture the young and, therefore, asking the government to assist those religions by governmental fiat. Those in government who see religion as an instrumentality of control look upon the proposition with favor. Indeed, New Hampshire still carries this precept in its contitution: ". . . morality and piety, rightly grounded on evangelical principles, will give the best and greatest security to government, and will lay, in the hearts of men, the strongest obligations to due subjection."

As proponents of individual liberty, American Atheists cannot endorse the laying of an obligation to due subjection in the minds of children. Please put American Atheists, then, on record as being inalterably opposed to governmental administrated prayer in the public schools.

AMERICAN ATHEISTS

Jon G. Murray, Director
AMERICAN ATHEIST CENTER

Madalyn Murray O'Hair
President

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Judiciary

American Farm Bureau Federation

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AREA CODE 202 - 484-2222

June 10, 1983

Honorable Strom Thurmond, Chairman
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Farm Bureau woud like to take this opportunity to comment on the Constitutional Amendments dealing with school prayer which will come before your Committee for consideration in the near future.

The American Farm Bureau Federation is the nation's largest general farm organization with a membership of over 3 million families in 48 states and Puerto Rico. Policies of the American Farm Bureau Federation are determined annually after being studied, debated, and approved by a majority vote of its members, at county, state, and national Farm Bureau meetings. The issue before this Subcommittee is of great concern to Farm Bureau members, as expressed by current Farm Bureau policy.

At the 1983 annual meeting of the American Farm Bureau Federation, the voting delegates of member state Farm Bureaus adopted the following policy:

> "...We believe it to be man's inalienable right to worship God, offer prayers and read the Bible as God's word in private and public places, including schoolrooms.
>
> "To perpetuate the principles on which this nation was founded, we support the necessary steps to reestablish the right to offer voluntary prayers in public schools."

We thank you for consideration of Farm Bureau's views.

Sincerely,

John Datt

John C. Datt, Secretary and
Director, Washington Office

cc: Members of the Committee

THE AMERICAN LEGION
64th NATIONAL CONVENTION
CHICAGO, ILLINOIS
AUGUST 24-26, 1982

RESOLUTION 330

COMMITTEE: Americanism

SUBJECT: SCHOOL PRAYER

WHEREAS, the majority of Americans have historically believed in seeking God's protection and guidance through prayer, and

WHEREAS, the value of expressing spiritual convictions through public prayer has been recognized as a firm basis on which to conduct public proceedings, and

WHEREAS, Supreme Court decisions during the early 1960's have had the effect of severely restricting the practice of any manner of public prayer although these decisions simply addressed prescribed or compulsory prayer, and

WHEREAS, this restriction is most evident in our nation's public schools where a concurrent moral and spiritual decline is clearly manifested, now, therefore, be it

RESOLVED, by The American Legion in National Convention assembled in Chicago, Illinois, August 24-26, 1982, that this organization urge the Congress of the United States to assume its responsibility in correcting the unnecessary problems created by court rulings which prohibited prescribed or compulsory prayer, and, be it further

RESOLVED, that we urge the Congress of the United States to express its majority belief in the value of voluntary prayer in public schools and at other public gatherings, and, be it further

RESOLVED, that Congress pass legislation to promote the concept of school prayer, including the approval of legislation to preempting federal courts from rendering decisions on prayer issues if such preemption is deemed necessary to insure that our nation's public school children have a daily opportunity to pray, and, be it finally

RESOLVED, that copies of this resolution be forwarded to the U.S. Senators and Representatives, the President of the U.S. Senate, the Speaker of the U.S. House of Representatives, the Chairmen of both the Senate and House Judiciary Committees, and the President of the United States.

אגודת ישראל
ESTABLISHED 1922

AGUDATH ISRAEL
OF AMERICA

הסתדרות
אגודת ישראל
באמריקה

OFFICE OF GOVERNMENT
AND PUBLIC AFFAIRS

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NEW YORK, N.Y. 10038
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July 13, 1983

Hon. Orrin Hatch
Room 135
Russell Senate Office Bldg.
Washington, D.C. 20510

Dear Senator Hatch:

I am writing to follow up on the recent hearings in the Senate Judiciary Committee on school prayer in public schools.

Agudath Israel of America, founded in 1922, is the broadest-based Orthodox Jewish movement in the nation. Its leadership consists of the foremost deans of rabbinical seminaries in the country. It represents grassroots Orthodox Jews in 30 states and provides a broad gamut of services to the community.

As one of the chief legislative advocates for the Orthodox Jewish community, I am certain that you will be interested in our concerns about the various proposals now before the U.S. Senate on school prayer.

We have in the past opposed school prayer bills which would have deprived the United States Supreme Court and the United States District Courts of jurisdiction over any case involving a dispute arising out of a state statute relating to the recital of voluntary prayers in public schools and public buildings. While we are generally favorably disposed to the reinstatement of the recital of prayers in public schools, these bills would accomplish such a result in a way that threatens to undermine the finely tuned balance of power between the three branches of government.

The supremacy of the Supreme Court is the ultimate interpreter of the constitution as a long accepted principle of American law and should not be changed by legislation. The issue here should not be viewed as one of school prayer, but it is an attempt to weaken the authority of the highest court in the United States and the lower federal courts. Although we may at times take issue with some of the decisions of the U.S. Supreme Court, we treasure its role in safeguarding civil liberties in this country.

We have viewed with extreme interest the proposal of the Administration. We strongly support the Administration's emphasis on the return to traditional values in the family, in the community and in society at large. Permitting prayer in schools is consistent with these values. However, the proposed constitutional amendment fails to define the type of "prayer" advocated, and this ambiguity could lead to unacceptable interpretations. We reserve judgment on this issue until the measure under consideration clearly spells out the form and text of the prayer to be recited in schools.

Thank you for this opportunity to make our views known.

Sincerely,

Menachem Lubinsky

Rabbi Menachem Lubinsky
Director of Government and Public Affairs

ML:dl

Backgrounder

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THE FIRST AMENDMENT AND FREEDOM OF SPEECH IN AMERICA

THE ISSUE

A problem of increasing concern in American society has been that of the burgeoning production of pornographic materials in the form of books, magazines, photographs, films, and motion pictures. While this problem has in itself attracted considerable attention, an even more notorious aspect of it has been the use of children in pornography. Recent accounts and studies by the police departments of various cities, by social workers and psychiatrists, and by local leaders indicate that the abuse of juveniles in the production of obscene materials is increasing. Authorities estimate that pornography in the United States has revenues of $1 billion a year and that child pornography ("kidporn") accounts for 10% of this. The Los Angeles Police Department has conducted an extensive survey of this type of pornography and has concluded that 70% of the child pornography market caters to homosexual depictions of boys, that 25,000 juveniles under 17 are currently involved in this aspect of the trade alone. In Mineola, New York, a pornographic ring was broken up which was estimated to make $250,000 a year.

Many congressmen and senators have expressed concern over the brutalizing effects of the production process on the children who are forced, intimidated, or gulled into participating. This aspect of the issue is not seriously in question; and, accordingly, several bills have been introduced in both the House and Senate to penalize the production of child pornography and to prevent more effectively the abuse of juveniles in its production.

However, due to the well-attested difficulties of apprehending the producers, some legislators feel that a more stringent approach is necessary. They point out, as have police officials, that pornographers are often transient and do not sign their work. Much of the production is on a short-term basis and occurs in private homes, motels, or abandoned locations. Children are often not the most reliable witnesses and cannot identify their victimizers; and the process of testifying may be traumatic for them. Thus, the legislators believe the only effective way to curb pornography, especially of this genre, is at the level of distribution rather than at the level of production. They advocate the punishment of the mailhouses and booksellers that sell child pornography.

This aspect of the proposed legislation is more controversial. Critics charge that such provisions would be a violation of the First Amendment, particularly if passed by Congress. The American Civil Liberties Union, for example, has supported

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NOTE: Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

the prosecution of the producers, but argues that prosecution of the distributors would be unconstitutional. When confronted with the difficulties of the police in this field, Alan Reitman of the ACLU said, "The police will just have to try harder." Congressman Paul Findley (R-Ill.) has stated, "The first amendment's guarantee of free speech and a free press cannot be set aside even to gain a conviction of a smut peddler."[1] On the other hand, Congressman Robert Dornan (R-Calif.) has stated, "As anyone who really understands the Constitution knows, the first amendment was never intended to protect gross indecency and the corruption of the public marketplace."[2]

In order to review the background of this debate, which goes to the core of meaning of our Constitution, let us examine the historical and legal implications of the First Amendment.

THE FIRST AMENDMENT: HISTORICAL AND LEGAL BACKGROUND

The First Amendment states the following:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Throughout American history many historians and legislators have believed that this statement guarantees an untrammeled right to say, write, or depict any and every opinion, argument, or statement whatever (though sometimes they would except libel), that the First Amendment creates the United States as an "open society." But whatever the value of the recognition of such rights and whatever the implications of the concept of an open society, there can be little doubt that the Founding Fathers were not for the most part proponents of this interpretation, nor did they believe in an open society as it has come to be thought of today.

Benjamin Franklin, for instance, in an early essay, "An Apology for Printers" (1731), argued that vice and immorality in printed material for public consumption should not be countenanced. In 1789, writing on the First Amendment in "The Court of the Press," Franklin said, "few of us, I believe, have distinct Ideas of Its Nature and Extent," indicating that he did not believe it had very large implications.[3]

Alexander Hamilton, writing in Federalist No. 84, argued that freedom of the press was indefinable and opposed the whole idea of a Bill of Rights in the first ten amendments. One of the men who, after Madison, was most responsible for the framing of the Constitution was James Wilson of Pennsylvania. Wilson argued in the ratifying convention of Pennsylvania that

> The idea of the liberty of the press is not carried so far as this [the open society idea] in any country -- what is meant by liberty of the press is that there should be no antecedent restraint upon it; but that every author is responsible when he attacks the security or welfare of the government, or the safety, character and property of the individual.[4]

In 1790 Wilson drafted the state constitution of Pennsylvania. He included a long section on liberty of the press, in which he stated,

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[1] Congressional Record, March 2, 1977, p. E1121.

[2] Congressional Record, May 18, 1977, p. H4686.

[3] Leonard W. Levy, Freedom of Speech and Press in Early American History: Legacy of Suppression (New York: Harper and Row, 1963), pp. 126-127, 200.

[4] Op. cit., pp. 201-202.

> The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty (Article IX, section 7). [Emphasis added][5]

This interpretation of the freedom of the press is quite different from that upheld by advocates of an open society. It argues that "liberty of the press" consists of liberty from prior inspection and censorship of publications before they are distributed, but that after publication the authors are responsible for what they said and can be prosecuted for it if they harmed public safety or morality or were guilty of libel. Delaware and Kentucky also had similar provisions in their constitutions. It is an interpretation that was based on the ideas of the eighteenth century English jurist William Blackstone, whose defense of the rule of law greatly influenced the Founders.

Others of the Founders who qualified their endorsement of the First Amendment were Hugh Williamson of North Carolina and John Adams. The latter believed that the press should be free within the bounds of truth but that falsehoods, scandals, and bad motives should be criminally prosecuted. Williamson also expressed belief in the Blackstonian idea that when government placed no prior restraints or license on publishing, "the press became perfectly free." John Marshall, in the Virginia ratifying convention of 1788, made statements that implied his belief that Congress could suppress minority critics if it had the support of public opinion.[6]

It might be objected that many of these men -- e.g., Adams, Hamilton, and Marshall -- were on the "conservative" or "authoritarian" wing of the Revolution and that others, such as Jefferson and Madison, expressed more libertarian views. It is true that Jefferson and Madison did express a wider interpretation of the First Amendment, especially at the time of the Sedition Act. But it should be noted that this Act was passed by their political opponents, that the U.S. courts never denied its constitutionality, and that Jefferson, when he became President, did not hesitate to support the prosecution of Federalist editors under the very Act. Jefferson's early opposition to the Sedition Act was clarified by him in a letter to Abigail Adams on September 11, 1804:

> While we deny that Congress have a right to control the freedom of the press, we have ever asserted the right of the States, and their exclusive right, to do so.[7]

> ...the press ought to be restored to its credibility if possible. The restraints provided by the laws of the States are sufficient for this if applied. And I have, therefore, long thought that a few prosecutions of the most prominent offenders would have a wholesome effect in restoring the integrity of the presses.[8]

And in his Second Inaugural, Jefferson said,

> These abuses of an institution [the press] so important to freedom and science are deeply to be regretted, inasmuch as they tend to lessen its usefulness and to sap its safety. They might, indeed, have been corrected by the wholesome punishments reserved to and provided by the laws of the several States against falsehood and defamation, but public duties more urgent press on the time of public servants....[9]

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[5] Op. cit., p. 203.

[6] Op. cit., pp. 216-217.

[7] Walter Berns, The First Amendment and the Future of American Democracy (New York: Basic Books, 1976), p. 82.

[8] The Constitution of the United States of America: Analysis and Interpretation: Annotations of Cases by the Supreme Court of the United States to June 29, 1972 (Washington, DC: U.S. Government Printing Office, 1973) p. 938, n.12.

[9] Inaugural Addresses of the Presidents of the United States from George Washington 1789 to Richard Milhous Nixon 1973 (Washington, DC: U.S. Government Printing Office, 1974), p. 19.

In other words, Jefferson several times expressed the belief that it was indeed unconstitutional for the federal government to legislate against the abuses of freedom of expression but that the states were free and authorized to do so. This does not support the current popular view of Jefferson as an exponent of the "open society" so much as it does the view that he dreaded the centralization of power in Washington. In any case, Jefferson's beliefs did not restrain his Administration from prosecuting the Federalist editor Henry Croswell in 1801 for his attacks on Jefferson's party.

Thus it cannot be said that the Founding Fathers were libertarians in any modern sense or that they believed seriously in the theory that the United States was an open society by virtue of the First Amendment. Franklin, Wilson, Hamilton, Jefferson, and several other less important of the Founders believed in what today would be considered a very limited role for the First Amendment: It pertained to the federal government but not to the states or it pertained to antecedent restraints (prohibition or press licensing), or both. In almost every case, these men believed that government had the right and the duty to prosecute irresponsible or seditious publications that threatened public safety.

COURT DECISIONS

The Blackstonian concept that regards liberty of the press as consisting in the absence of prior restraints is not a mere legal antiquity. Until well into the twentieth century it was the dominant interpretation of the meaning of the First Amendment and was expressed by Oliver Wendell Holmes in 1907. Holmes later modified his interpretation in Schenk vs. U.S., where he gave his famous "clear and present danger" opinion; but one week later he expanded on his conception of the meaning of the First Amendment, with unanimous consent, in Frohwerk vs. U.S., 249 U.S. 204 (1919):

> ...it is necessary to add to what has been said in Schenk v. United States...only that the First Amendment while prohibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity to every possible use of language....

Although the Supreme Court in the 1950s and 1960s considerably modified its interpretation of the meaning of the First Amendment and moved towards a wide libertarian concept, the current status of Supreme Court rulings on freedom of speech is far from recognizing a constitutionally mandated open society. A brief review of some of these decisions in two areas of First Amendment cases will serve to indicate the existing judicial consensus on this issue.

NATIONAL SECURITY

In Dennis vs. U.S., 341 U.S. 494 (1951), the Court upheld the conviction of eleven Communists for violation of the Smith Act, which forbids advocacy of violent overthrow of the government. In Yates vs. U.S., 354 U.S. 298 (1957), the Court overturned the conviction of several CPUSA leaders, but this decision was based on construction of the statute, not on the First Amendment. In 1961, the Court upheld the Internal Security Act of 1950 (McCarran Act) requiring registration of the CPUSA in Communist Party vs. SACB, 367 U.S. 1 (1961), with only Justice Black dissenting. In Scales vs. U.S., 367 U.S. 203 (1961), the Court upheld the constitutionality of proceedings against the members or organizers of a group proscribed by the Smith Act.

However, in 1969, the Court went far toward reversing this long-standing trend. In Brandenburg vs. Ohio, 395 U.S. 444 (1969), the Court forbade states to legislate against advocacy of illegal or violent action unless such advocacy is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

It is possible to see this recent trend in Court rulings as a deviation from the traditional juristic interpretation.

There can be little doubt that it does represent a radically different understanding of the First Amendment from that held by the earlier interpreters and the Framers themselves. But some, with apparent incongruity, believe that it is a "fulfillment" of the lines laid down by the Framers. It is difficult to accept this idea when there is such a broad disparity between their recorded statements and the current trend.

OBSCENITY

There is little doubt in this area that the Supreme Court has excluded obscenity from the protection given by the First Amendment. Thus, in Roth vs. U.S., 354 U.S. 476 (1957), Justice Brennan argued that "the unconditional phrasing of the first amendment was not intended to protect every utterance." The Court pointed out that practically all of the state legislatures ratifying the First Amendment had laws against blasphemy or profanity or both. "Implicit in the history of the First Amendment," wrote the Court, "is the recognition of obscenity as utterly without redeeming social importance."

The clear and present danger test, applicable in internal security cases, was rejected for obscenity. However, the problem is not whether the First Amendment protects obscenity but what obscenity is. Brennan held that "obscene material is material which deals with sex in a manner appealing to prurient interest." And the Court arrived at the test for obscenity that a publication in its dominant theme appealed to the prurient interest of the average person, applying contemporary community standards. This test was again upheld in the Fanny Hill decision, 383 U.S. 413 (1966). But despite this affirmation, rulings since 1966 have tended to broaden the definition of obscenity, to reverse convictions for obscenity, and, in the opinion of many, to undermine the meaning of the Roth decision. In Stanley vs. Georgia, 394 U.S. 557 (1969), the Court upheld the right of an individual to possess obscene materials in his home, though it reasserted the Roth standards. In U.S. vs. Reidel, 402 U.S. 351 (1971), the Court upheld the constitutionality of prohibiting the distribution of obscene materials through the mails and the authority of customs officials to seize obscene materials from travelers' baggage. The Court again specifically reasserted the Roth standards.

However, in decisions of 1973, notably Miller vs. California, 413 U.S. 15 (1973), the definition of obscenity was altered somewhat. Henceforward, a work is to be considered obscene if, as a whole, it appeals to a prurient interest, portrays sexual conduct in a patently offensive manner, and does not, taken as a whole, have "serious literary, artistic, political, or scientific value." This latter phrase replaced the Roth ruling that it must be "utterly without redeeming social importance" and is thus a more stringent standard. The Court also emphasized the role of the community in providing determination of obscenity, but whether this is to be the state or local community is not yet clear. A national, uniform definition of obscenity is, however, no longer required to declare a work obscene.

EXISTING FEDERAL LEGISLATION

At the present time there are five federal statutes which regulate obscenity and its distribution. These are: 19 U.S.C. section 1305, which forbids the importation of obscene materials into the United States; 18 U.S.C., section 1461, which prohibits the mailing of such materials; 18 U.S.C., section 1464, which prohibits obscene broadcasts; and 18 U.S.C., sections 1462 and 1465, which prohibit interstate transportation of obscene materials or the use of common carriers to transport them. In 1968, Congress enacted the Anti-Pandering Act (39 U.S.C., section 3008) which gave postal patrons authority to terminate the mailing of unsolicited, sexually offensive materials.

IS AMERICA AN "OPEN SOCIETY"?

The legal history recounted above would indicate that there is little basis for the often-heard contention that the Founding Fathers, the Framers of the Constitution, or the Supreme Court have established through the First Amendment an "open society" --

i.e., a society in which all expressions, regardless of their moral value or social and political consequences, have an equal status of permissibility before the law. It is true that the Court, especially in recent years, appears to have moved in this direction, but even here its record is as yet ambiguous and far from unequivocal. There yet remains adequate constitutional authority for the legal punishment of expressions which threaten national security or public morality.

But an increasing number of citizens find such precedents irrelevant to what they regard as the progressive trends of contemporary society. Even if American legal traditions do not support an open society, these persons would argue, we should move toward one in recognition that government has no business in protecting morality or deciding what is dangerous, if the act or statement does not actually hurt anyone. In other words, these persons advocate the creation of an open society regardless of American traditions.

The problem of whether an open society is a desirable, or even a possible, one is an ancient question of social philosophy. Critics of the concept of an open society have pointed out that human society consists in a set of beliefs or affirmations shared by all or most members, past and present, of the society. This "consensus" or "public orthodoxy," they argue, is what really gives definition and meaning to what would otherwise be a disparate aggregation of individual wills. Without such a consensus, this aggregation would be incapable of any sustained or concerted enterprise: to support a policy calling for public sacrifice, to fight a war, or to have any agreed sense of what the goals and basic values of the society are.

Those who hold this belief that a consensus must undergird social cohesion point out that it is at odds with the "open society" concept. The latter admits no such consensus and assumes that individuals may do and say what they please within the limits of not harming others or preventing them from doing or saying what they please. Many of the consensus school also emphasize that, though the majority in a society believe in and live by the consensus, a minority may violate it or at least parts of it. This violation by a numerical minority can have disruptive effects on the consensus and on the society's perception of its common purposes. It is therefore the duty of the government to enforce the consensus and to provide appropriate sanctions and legislation in support of it.

Such a position is often caricatured as "repressive" and presented as leading to a totalitarian system of thought control. The libertarian advocates of openness often charged that, once public authorities enter the field of enforcing moral values, there is no logical stopping place on the road to philistinism in taste, the complete suppression of dissent, and a return to Victorian standards of public morals. Consensus advocates reply, however, that there is no necessary progression from the punishment of those forms of expression which threaten subversion or the debasement of morals to these extreme results. In any case, they argue, the dangers of repression are not now our problem. Philistinism is already triumphant in Deep Throat and Larry Flynt's Hustler magazine. Dissent is already threatened when demonstrators are legally able to enforce silence on those with whom they disagree and when advocates of traditional morality are denied access to public forums. As for the much dreaded return to "Victorian morality," many advocates of stricter public discipline point out that 45% of the American people favor stricter standards for the sale of "sexually explicit material" (only 6% believe in less strict standards, as reported in the Gallup Opinion Index of May, 1977, page 4) and that this large cross-section of the population cannot be limited to those who have socially extremist or unrepresentative opinions.

LEGISLATING MORALITY

Libertarians also argue against legal protection of public morality by advancing the argument that morality cannot, or should not, be legislated. But it is difficult to see what else can be legislated. Any law forbidding one act or permitting or commanding another contains an assumed judgment of value that the forbidden acts are wrong and anti-social or that a legal act is good and pro-social. A law against murder condemns murder as wrong just as much as a law against obscenity condemns obscenity. The libertarian question, "Who decides what is wrong?" is essentially a political problem in this context. The duly appointed political representatives of a society decide this, whether they are to be the courts, the Congress, or the state and local governments.

It is precisely the point of the consensus advocates that hostility to permissiveness and to the highly vocal radicalism that attacks both public decency and national security is in keeping with the mainstream of American life and society, and not just a transient whim or a prudish backlash. As the late Willmoore Kendall of Yale once wrote:

> Those beliefs that the people share are what defines its character as a political society, what embodies its meaning as a political society, what above all, expresses its understanding of itself as a political society, of its role and responsibility in history, of its very destiny.... In such a society by no means are all questions open questions; some questions involve matters so basic to the consensus that the society would, in declaring them open, abolish itself, commit suicide, terminate its existence as the kind of society it has hitherto understood itself to be.[10]

Many in the consensus school argue that those who favor more permissive standards for the sale of pornography or who indulge in support for un-American political causes are alienated from or hostile to the way of life characteristic of American society. They object that it is unjust and undemocratic that these minorities or their allies are able to dominate not only public discourse but also that increasingly the Supreme Court seems to be imposing the peculiar values and beliefs of this minority on the large remainder of the population.

CONCLUSION

It would appear from the above review that federal legislation prohibiting or controlling the distribution of obscene materials is in keeping with the long-standing traditions of American Constitutional law. Such legislation may be open to other criticism: it cannot be adequately enforced; it requires too much of the time and effort of local or federal police agencies; it is inconsistent with the movement toward an open society that the United States has experienced in the recent past. But these are pragmatic considerations, and in the last case, a question of social and political philosphy. As such, they are separate from and independent of the more narrow question of the meaning of the First Amendment for the future of public morality and national security.

Samuel T. Francis
Policy Analyst

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[10] Willmore Kendall, The Conservative Affirmation (Chicago; Henry Regnery Company, 1963), pp. 74-75.

DO SCHOOL-PRAYERS VIOLATE THE CONSTITUTION?

Dr. Hermine Herta Meyer
Attorney-at-Law

INTRODUCTION

Dr. Hermine Herta Meyer is a member of the Bars of New York, the District of Columbia, and the United States Supreme Court. She acquired a degree of doctor of law and political science from the University of Zurich, Switzerland, and an LLB (now called JD) from New York University. She served as Legal Adviser to the Embassy of Switzerland and as an attorney of the Department of Justice for 15 years where she was first a trial attorney, later an attorney to the Office of the Deputy Attorney General. She has had wide experience in international and constitutional legal problems which resulted in the publication of books and articles in four different countries. Of particular interest here is her book on "The History and Meaning of the Fourteenth Amendment (New York 1977), and two articles: "The Constitutionality of Pretrial Detention (Georgetown Law Journal 1972), and "The Confusion of Judicial Law-Making -- Or Do We Still Have a Federal Constitution?", Women's Law Journal, 1977.

Dr. Meyer's unusual experience in American and international law has made her especially aware of an alarming problem in the United States, namely the gradual replacement of a Constitution based on the democratic principles of sovereignty and self-government of the people by an undemocratic, unconstitutional government of unelected judges who, in the guise of "constitutional interpretation", have arrogated to themselves the power to dictate to the people what laws they may or may not have.

In her pamphlet entitled "Do School Prayers Violate the Constitution", Dr. Meyer describes how the Supreme Court, by pretending to "interpret" the Constitution, (but in reality changing it), deprived the people of their constitutional right to determine for themselves whether or not they want to have prayers in their public schools, and how the Constitution has made it possible for Congress to restore this constitutional condition by a simple law. The Senate has already done this by passing Senator Helms' amendment to the Supreme Court Jurisdiction bill (S.450), to prevent the federal courts from taking jurisdiction in cases concerning voluntary prayers in public schools and public buildings of the States, a jurisdiction which the Constitution has never given to the federal courts. It is to be hoped that the House will follow this example and thus be true to the oath which every single member of Congress was required to swear, namely "to support this Constitution."

July 1980 Mary E. Bull

DO SCHOOL-PRAYERS VIOLATE THE CONSTITUTION?

A federal law, namely Title 36, Section 172 of the United States Code, has designated the following words as the pledge of allegiance to the Flag:

> "I pledge allegiance to the Flag of the United
> States of America, and of the Republic for which
> it stands, one Nation under God, indivisible,
> with liberty and justice for all."

The Congress of the United States opens each session with a prayer.

At the opening of each session of the United States Supreme Court, the judges stand while one of the Court's officials, the Crier of the Court, invokes the protection of God with the words:

> "God save the United States and this
> honorable Court."

If these invocations of God do not violate the Constitution of the United States, how could it be violated, when children do this in the schools?

Yet, in 1962, the United States Supreme Court ruled in Engel v. Vitale[1/] that the Constituion was violated by the New York State Board of Regents when it provided that those children in the public schools of New York who wished to do so may join at the beginning of each school day in the following little prayer:

> "Almighty God, we acknowledge our dependence upon
> Thee, and we beg Thy blessings upon us, our parents,
> our teachers and our country."

Justice Black wrote the opinion of the Court. The petitioners had argued that "the State's use of the Regent's prayer in its public school system breaches the constitutional wall of separation between Church and State." Justice Black agreed with them. He said that this was embodied in the religion clause of the First Amendment, "as reinforced by the provisions of the Fourteenth Amendment," and that prayers in public schools violated the establishment part of the religion clause of the First Amendment.

On 14 printed pages, Justice Black gave a historical review of the quarrels over the Book of Common Prayer in England and of the history of the early establishment and later rejection of official churches in the American States. But the one thing he did not do was to look into the history of the religion clause in the First Amendment to the United States Constituion in order to find out its intended meaning, and tell us where in the provisions of the Fourteenth Amendment that clause had been "reinforced."

In 1963, the Supreme Court ruled in Abington School District v. Schempp[2/] that state laws providing for prayers and Bible reading in public schools violated the establishment part of the First Amendment's religion clause which had been made "applicable" to the States by the Fourteenth Amendment. In that case, Justice Clark wrote the opinion of the Court. It is 22 printed pages long. But he also did not give us the constitutional history and meaning of the First Amendment's religion clause, nor did he explain where in the Fourteenth Amendment that clause has been made "applicable" to the States. Only in a footnote are we told that in previous cases the Supreme Court had decided that the "liberties" of the First Amendment were protected by the due process clause of the Fourteenth Amendment.[3/]

Evidently, in order to know whether the Religion clause of the First Amendment together with the due process clause of the Fourteenth Amendment really forbid prayers in the public schools of the States, we will have to know the constitutional meaning of these two clauses.

The First Amendment's Religion Clause was meant to prevent Federal Interference with the Right of the States to make their own Laws respecting Religion.

The religion clause of the First Amendment reads:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

As can be seen, it says nothing about separation between Church and State. As the language shows, it is a restriction on the federal government only. There is no provision in the entire Constitution which says that the States shall make no such law. The debates in the First Congress, where the first ten amendments were made, show clearly that the purpose of the religion clause was to prevent Congress from establishing a national church and from interfering with the exercise of religion in the States. The expression "establishment of religion" in those days meant an official state church.[4]

At least one judge of the Supreme Court must have read those debates, namely Justice Stewart, because he stated the constitutional meaning of the clause correctly in his dissenting opinion in Abington School District v. Schempp. There he said that the First Amendment was adopted "solely as a limitation of the newly created National Government." It was to insure

> "that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments. Each State was left free to go its

> own way and pursue its own policy with respect to religion. Thus Virginia from the beginning pursued a policy of disestablishmentarianism. Massachusetts, by contrast, had an established church until well into the 19th century." 5/

The Fourteenth Amendment nowhere mentions Religion.

The Supreme Court said that the Fourteenth Amendment has made the religion clause "applicable" to the States.

Anyone who takes the trouble of reading the Fourteenth Amendment, will find that it nowhere mentions religion. Where then did the Fourteenth Amendment make the religion clause of the First Amendment applicable to the States?

In Engel v. Vitale the Supreme Court did not say anything about it.

In Abington School District v. Schempp the Supreme Court referred to other cases where the Court had ruled that "the liberties guaranteed by the First Amendment" are "embraced" by the "fundamental concept of liberty" embodied in the due process clause of the Fourteenth Amendment.

The due process clause of the Fourteenth Amendment reads:

> "... nor shall any State deprive any person of life, liberty, or property without the process of law."

The clause does mention the word "liberty". However, it expressly permits the States to take "liberty," but not without due process of law. The clause was copied from the Fifth Amendment where it applies only to the federal government. It came from the English law, and at the adoption of the Fifth Amendment in 1791 it was already over 500 years old. It has always meant the same, namely that no person accused of crime may be sentenced to death, or to imprisonment, or to forfeiture of property without first having been given an opportunity to defend himself in a proof procedure, today called trial. Since the due process clause in the Fifth Amendment did not bind the States, they were able to make different procedural rules for blacks and for Chinese, than they made for whites. This placed the blacks and the Chinese at a considerable procedural disadvantage. The purpose of the due process clause in the Fourteenth Amendment was to make it applicable to the States and thus insure to "any person," meaning any human being, without distinction as to race or color, the same procedural rules without which he could not have "due process of law," or, in the words of Representative (later President) Garfield, "an impartial trial according to the law of the land." In short, the due process clause guarantees to any person charged with crime by the federal government (in the Fifth Amendment), as well as by a State (in the Fourteenth Amendment) access to a trial before he can be sentenced to death, or imprisonment, or forfeiture of his property.[6/]

The due process clause of the Fifth Amendment is the only provision of the Federal Bill of Rights, as amendments one to eight are commonly called, which the Fourteenth Amendment to the Constitution has made applicable to the States. None of the other provisions of the Federal Bill of Rights is mentioned in the Fourteenth Amendment.[7/] Therefore, the Supreme Court originally correctly held that the due process clause of the Fourteenth Amendment cannot possibly be interpreted as including other provisions of the Federal Bill of Rights.[8/] This is the only logical conclusion that can be drawn from the language and the history of the Fourteenth Amendment. To place freedom of religion into its due process clause, would read: "nor shall any State deprive any person of freedom of religion without due process of law." That would mean that a State could deprive a person of freedom of religion if it provided a procedure for doing so. This makes no sense. The due process clause makes sense only if given its constitutional and historical meaning, namely that no person charged with crime can be sentenced to death, or imprisonment, or forfeiture of property without first having been given access to a trial pursuant to the preexisting laws.

Did the Supreme Court interpret the Constitution when it declared that School-Prayers are unconstitutional?

Article VI of the U.S. Constitution provides that every federal and state official and all judges "shall be bound by Oath or Affirmation to support this Constitution," that is the Constitution as written and intended by the framers and as legally amended by the representatives of the people in Congress and the legislatures of the States.

In the same article it is said that this Constitution shall be the supreme law of the land.

When interpreting a law, courts have a duty to give effect to its language. If the language is not clear, they have a duty to ascertain the intent of the framers and for what purpose a legal provision was adopted. This can be found from the legislative history.

In the two cases in which the Supreme Court ruled that prayers in State public schools violated the Constitution of

The United States, the Court respected neither the language of the constitutional provisions nor their history. Rather, the Court read into them a meaning which the Court wanted them to have, in order to force the Court's own ideas on the people. Thereby the Court did not interpret the Constitution, but illegally amended it, because the Court deprived the States and their people of their constitutional right to determine for themselves whether or not they wanted to have prayers in the public schools.

To understand this fully, it will be necessary to explain briefly the nature of the United States Constitution.

The Nature of the Constitution of the United States.

With the Declaration of Independence of July 4, 1776, the 13 North-American Colonies constituted themselves into 13 independent States. Each State assumed full sovereignty, internal as well as external. The people of the States proceeded to give themselves constitutions. All were based on the principle of self-government of the people. Many state constitutions had express provisions to that effect, as for instance the Constitution of Pennsylvania of 1776 which said,

> "That all power being originally inherent in, and consequently derived from the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them." 9/

With the Articles of Confederation, signed by each of the 13 States between July 9, 1778 and March 1st, 1781 (Maryland signing as the last State), the States entered "into a firm league of friendship" and delegated some of their powers to the United States in Congress assembled, reserving to themselves every power not so delegated.

The Articles of Confederation were soon perceived to be inadequate. On February 21, 1787, Congress passed a resolution providing for a Federal Convention of delegates to be appointed by the several States to be held at Philadelphia for the purpose of revising the Articles of Confederation.

The Federal Convention convened in May 1787. Twelve States sent delegates. (Only Rhode Island sent no delegates). These delegates represented 12 individual States which possessed all the powers of sovereignty with the exception of the few powers which they had delegated by the Articles of Confederation to the United States in Congress. Thus, whether the Federal Convention would merely add to the powers of Congress or, as it did, create a new "general government" for the States that never before existed, in either case the additional powers would have to be delegated by the several States. Powers that were not delegated, were retained by the States or their people, which means the same, because in a Republic based on the principle of the sovereignty of the people, the people are the States. No State could be forced to accept the new central government without its individual consent. This is clearly expressed in Article VII, paragraph 1 of the U.S. Constitution which says,

> "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same."

In 1789, when the First Congress convened under the new Constitution, only eleven States had ratified the Constitution and thereby become members of the Union. Two States, North Carolina and Rhode Island, joined later.

When the proposed constitution was presented to the States for ratification, there were objections that the powers of the general government were too wide and often too ambigious. It was feared that they might be used to oppress the States as well as individuals. Therefore there were demands for a Federal Bill of Rights "to serve as a barrier between the general government and the respective States and their citizens." These became amendments one to eight, commonly called the Federal "Bill of Rights". They are special restrictions on the federal government, not grants of power. They all represent rights retained by the States and their people. In order to guard against an interpretation that other rights retained by the people of the States, which had not been singled out as special restrictions on the federal government, were assigned to the federal government by implication, the Ninth Amendment was added, as follows:

> "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

As an added precaution to protect the reserved rights of the States, several States particularly requested that it should be declared in the Constitution.

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

This became the Tenth Amendment.

Thus, it should be clear that the federal government has only such powers as were granted to it by the States, which are enumerated in the United States Constitution. In order to carry into execution these enumerated powers, the Constitution has authorized Congress to make laws "necessary and proper" for this purpose. Madison explained in No. 44 of the Federalist Papers that they are the means for carrying out the powers enumerated in the Constitution. They are the only "implied" or "inherent" powers possible in the Constitution. As Chief Justice John Marshall expressed it, "inherent powers" can only be such powers as are necessary and proper for carrying into execution powers expressly given in the Constitution.

Outside of the U.S. Constitution, no federal power can legitimately exist. As late as 1957, in Reid v. Covert [10/], the Supreme Court acknowledged that

> "The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution."

The "Law of the Land" in the U.S. Constitution.

It should be noted that the U.S. Constitution has given the courts no authority to make generally binding laws. The very first article says without any possibility of misunderstanding, "All legislative Powers herein granted shall be vested in a Congress of the United States." This means that the Constitution has entrusted the authority to make generally binding federal laws exclusively to persons elected by and responsible to the people, not to judges appointed for life and responsible to no one.

The Supreme Court also recognized in Ullmann v. United States [11/],

> "Nothing new can be put into the Constitution except through the amendatory

> process. Nothing old can be taken out
> without the same process."

Article V of the Constitution has given the power to amend it to persons elected by, and responsible to, the people, namely to the Congress and the legislatures of the States, not to a handful of life appointed judges responsible to no one.

All this shows that, like the constitutions of the States, the Constitution of the United States is based on the democratic principle of self-government of the people. Under such a system, only the people can make generally binding laws, either directly through initiative and referendum, or indirectly through elected representatives whom the people can influence either through personal contacts, such as letter writing or telephoning or at the ballot box.

The people have no influence over court decisions. The claim that a Supreme Court decision is "the law of the land" finds no support anywhere in the Constitution. The only place where the words "the law of the land" appear in the Constitution, is in the so-called Supremacy Clause of Article VI. It was intended to bind the judges in the States to accept as the "supreme law of th land" this Constitution, that is the Constitution as written and intended by the framers and as legally amended; the laws passed by the United States Congress in pursuance of this Constitution; and the treaties made under the authority of the United States. The Constitution nowhere says that a Supreme Court decision shall be the supreme law of the land or the law of the land.

The text of the U.S. Constitution reflects the intent of its framers, as it appears from Madison's notes which he made at the Federal Convention of 1787 where the Constitution was drafted. An earlier draft had given the Supreme Court general jurisdiction only over "all cases arising under laws passed by the Legislature of the United States." Dr. Johnson of Connecticut moved that the jurisdiction be extended "to all cases arising under this Constitution." Madison doubted "whether it was not going too far to extend the jurisdiction of the Court generally to cases arising under the Constitution." But then he agreed after it was generally understood "that the jurisdiction given was limited to cases of a Judiciary nature." Madison emphasized that "the right of expounding the Constitution in cases not of this nature ought not to be given to that Department."[12/] This was understood to mean that the federal courts, including the Supreme Court, would have jurisdiction to interpret constitutional questions in a case or controversy brought before them, but that such interpretation would bind only the parties properly before the courts.[13/] The rule that a court decision binds only the parties to a suit and is not a generally binding law was the rule prevalent in the entire western world. Had the framers of the U.S. Constitution wanted to depart from it and make a Supreme Court decision the "law of the land," they would have said so in the Constitution.

It follows that when the Supreme Court creates a "constitutional right" or a "constitutional prohibition" which appears nowhere in the language of the Constitution, the Supreme Court in reality acts against the Constitution, because it takes this right from the States and their people without a legitimate constitutional amendment. There is no vacuum in the Constitution of the United States. The Tenth Amendment says very clearly that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people."

The Powers to regulate Schools and School-Prayers belong to the retained Rights of the States and their people.

The words "schools" or "prayers in the public schools" nowhere appear in the Constitution of the United States. The clause of the First Amendment which prohibits Congress from making any law respecting an establishment of religion and from interfering with the free exercise thereof is not a grant of power but a special restriction on the federal government. The Fourteenth Amendment which provides for restrictions on the States, contains no language which forbids the States from making laws with respect to religion or to schools, nor does such a prohibition appear anywhere else in the Constitution.

It follows that the States have never delegated to the federal government their authority over their schools nor their right to make any laws they like with respect to religion. These powers belong to the reserved rights of the States and therefore cannot possibly violate the Constitution of the United States.

As explained above, in its decisions prohibiting prayers in the public schools of the States, the Supreme Court has not only misinterpreted the religion clause of the First Amendment in disregard of its language and its historical meaning, it also has made nonsense of the due process clause of the Fourteenth Amendment for the purpose of misusing it as a constitutional cloak to cover up the Court's lack of authority to deprive the

States of their reserved powers to make their own laws with respect to religion. The nature of the U.S. Constitution makes clear that a right reserved by the States can legally be taken from them only by a constitutional amendment. As said before, the right to amend the Constitution was given by it to persons elected by and responsible to the people, not to a handful of judges appointed for life and responsible to no one.

Thus, by illegally amending the Constitution in the guise of "interpretation", the Supreme Court has been guilty of horrendous usurpation. It has usurped the right reserved to the States and their people to make their own laws with respect to religion, and the power of Congress and of the legislatures of the States to whom alone the Constitution has given the power to amend it. In the process, the Supreme Court did what the Constitution expressly prohibited Congress from doing, namely prohibited the free exercise of religion in the States.

The Constitution has given the People Protection against Judicial Usurpation.

As shown above, the United States Constitution, like the constitutions of the States, is based on the principle of self-government of the people. It would be strange if such a Constitution had left the people without protection against the misuse of power by life appointed judges.

Article III, Section 2, Clause 2 of the Constitution gives Congress complete control over the entire jurisdiction of the lower federal courts and over the appellate jurisdiction of the United States Supreme Court. Almost all state cases reach the Supreme Court by way of appeal. Therefore Congress could prohibit the federal courts, including the Supreme Court, from taking jurisdiction in all cases concerning prayers in the public schools of the States. Thereby Congress would merely prevent the federal courts from taking jurisdiction in cases in which the Constitution has given them no jurisdiction in the first place.

Article III, Section 2, Clause 1 of the Constitution provides that the judicial power of the United States "shall extend to all Cases, ... arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." As shown before, the right to make laws concerning prayers in the schools of the States belongs to the retained rights of the States. There is, therefore, no federal question involved and no good faith constitutional issue. Therefore there is no federal jurisdiction, and the Supreme Court should have dismissed such cases for want of federal jurisdiction.

What the People can do.

Repeatedly, bills have been introduced in Congress to prevent the federal courts from taking jurisdiction in cases in which the Supreme Court had created trumped up constitutional issues to deprive the States and their people of their retained rights as, for instance, in cases of apportionment of State Legislatures, abortion and prayers in the schools of the States. They never succeeded in passing both houses of Congress because the people had voted too many persons into Congress who agreed with the results of the respective Supreme Court decisions and, therefore, told the people, falsely, that what the judges said was the Constitution, while in truth the judges had illegally amended the Constitution.

In September 1979, an article in the Readers Digest, entitled, "Should Prayer be restored to our Public Schools?" by Eugene H. Methvin, reported that public opinion polls have shown "that a stable majority of about 75 percent of Americans favors restoring public-school prayer."

Each member of Congress is elected by the people in the States. Therefore, if all those people really want to re-establish constitutional conditions with respect to prayers in the schools, they have to vote into Congress persons who are willing to use their constitutional powers for the purpose of truly "conserving" the Constitution with respect to the people's right of governing themselves. This includes their right to determine for themselves whether or not they want to revive prayers in their public schools.

As has been shown, Congress can do that by a simple law to prevent the federal courts, including the Supreme Court, from taking jurisdiction in such cases. This would restore the constitutional right of the people in the States to be free from federal interference in accordance with the prohibition of the First Amendment which the Constitution has never made applicable to the States.

THE TRUTH ABOUT THE UNITED STATES CONSTITUTION
IS THAT SCHOOL-PRAYERS DO NOT VIOLATE THE CONSTITUTION.

Hermine Herta Meyer
Attorney-at-Law

Notes to

DO SCHOOL-PRAYERS VIOLATE THE CONSTITUTION?

1) 370 U.S. 421 (1962).

2) 374 U.S. 203 (1963)

3) Id. at 216 n.8.

4) 1st Cong., 1st Sess., 1 Annals of Congress 474-438, 729-731. (1789).

5) 374 U.S. at 309-310, J. Stewart dissenting.

6) H.H. Meyer, The History and Meaning of the Fourteenth Amendment 125-137 (New York 1977).

7) Id. 12-17.

8) Hurtado v. California, 110 U.S. 516, 534-535 (1884); In re Kemmler, 136 U.S. 436, 448-449 (1890); Maxwell v. Dow, 176 US. 581, 582, 584 (1900).

9) Constitution of Pennsylvania - 1776, Declaration of Rights Art. IV, 5 Francis N. Thorpe, The Federal and State Constitutions and other organic Laws 3082 (Washington, D.C. 1909).

10) Reid v. Covert, 354 U.S. 1, 5-6 (1957).

11) Ullmann v. United States, 350 U.S. 422, 428 (1956).

12) 2 Max Farrand, The Records of the Federal Convention of 1787, p.430.

13) 2 George Bancroft, History of the Formation of the Constitution of the United States of America 198 (New York 1882); Wm. M. Meigs, The Relation of the Judiciary to the Constitution, 19 American Law Review 175, 190-194 (1886).

For further information or additional copies please contact the National Committee to Revive Voluntary School Prayer which is located in the Washington, D.C. metropolitan area. The telephone number is (301)986-0115. Mrs. G.G. Bull, President.

Voluntary School Prayer:
Judicial Dilemma,
Proposed Solutions

by
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The Child and Family
Protection Institute
of
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Education Foundation

CHAPTER 1

The First Amendment

The Intent of the Framers

Many Americans familiar with the U.S. Supreme Court decisions prohibiting voluntary prayer in public schools, but unfamiliar with the wording of the United States Constitution, would probably think the Constitution contained the words "strict separation between church and state" or "there must be a high and impregnable wall between church and state." Given the U.S. Supreme Court's decisions concerning church-state issues over the past 20 years, this would be a good guess. After all, these phrases are repeated and quoted endlessly in any discussion of church-state issues, particularly the cases dealing with voluntary school prayer. If those words were in the Constitution the court's decisions would be more understandable. But those words are *not* in the Constitution.

The key to analyzing the school prayer cases is to determine whether or not the court has properly interpreted the First Amendment Establishment Clause. Justice Felix Frankfurter said "An amendment to the Constitution should be read in a sense most obvious to the common understanding at the time of its adoption."[1] In other words, when interpreting the Constitution, binding authority is given to the text of the Constitution and to the intention of its authors. One legal scholar listed several reasons for giving the Constitution its original meaning.[2] First, the Constitution is the Supreme Law of the land so that it takes precedence over all subsequent laws if there is an inconsistency. Second, since the document is interpreted consistently over time, judges have less discretion to write what they themselves would have written had they drafted the Constitution. Finally, the document represents the will of the people. The Constitution begins "We, the people of the United States . . ."

To truly understand our religious rights as Americans—in order to protect our rights—it is necessary to analyze and study the original meaning of the First Amendment by examining the actual wording of the amendment; the intent of the individuals responsible for its adoption and ratification and the relevant historical records and documents. The purpose of this chapter is to come to a better understanding of the meaning of the First Amendment so that we can better defend our religious liberties.

The U.S. Constitution was adopted and ratified in 1789. Many states approved the Constitution contingent on the first Congress passing the Bill of Rights, thereby giving added protection to the states from the federal government. The Federalists argued that the Bill of Rights was redundant and unnecessary since the federal government had no power unless it was expressly given in the Constitution and the Constitution gave the federal government no authority or power over religion. Nevertheless, those in the first Congress kept their word. Only two years later, in 1791, the Bill of Rights guaranteeing civil liberties including freedom of religion, freedom of the press and freedom of speech, protection against illegal search and seizure and self-incrimination was added to the Constitution.

The First Amendment to the Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The first sixteen words of the amendment embody the two religion clauses guaranteeing first, that *Congress* shall enact no law "respecting an establishment of religion," and second, that Congress shall not prohibit "the free exercise" of religion. The Supreme Court has prohibited voluntary school prayer on the finding that it is an "establishment of religion."

What did the words "respecting an establishment of religion" mean to Members of Congress who approved the language of the amendment? Several well respected historians and legal scholars after careful analysis of the proposed drafts of the First Amendment and the congressional debates surrounding adoption of the amendment conclude that the Congressmen understood first, that an "establishment of religion" was the setting up of an official government religion which would receive preferential treatment over all other religions, and second, that the term "respecting" meant that Congress could not enact any law with regard to an established religion—either creating a national religion or interfering with the state established religions.[3]

Justice Joseph Story in his authoritative *Commentaries on the Constitution* made clear in his analysis of the First Amendment that it was adopted to prevent the establishment of a national religion, but the amendment in no way interfered with the power of the individual states over religion. He wrote:

> The real object of the amendment was . . . to exclude all rivalry among Christian sects, and to prevent any *National ecclesiastical establishment*, which should give to an hierarchy the exclusive patronage of the national government.[4]

Story also noted:

> Thus, the whole power over *the subject of Religion is left exclusively to the state governments*, to be acted upon according to their own sense of justice; and the state constitutions.[5]

Two leading experts on the First Amendment, Dr. Robert L. Cord and Dr. James McClellan, after studying the words and actions of the framers and all the documentation relating to the First Amendment conclude that there are three objectives to the First Amendment.[6] First, there is no Congressional authority to establish a formal national church or religion or sect which would necessarily give one religion preferential treatment over all other religions. Second, each individual is guaranteed the freedom to believe as he chooses. Finally, each state has the right and power to establish a state religion if it so chooses. The historical data does *not* support the theory that the First Amendment was adopted to ensure an absolute separation between church and state.

A cursory description of the church-state relationships in the early years of the Republic and several examples of government action involving religion taken by the earliest American statesmen will enable us to better understand the original meaning of the First Amendment.

It is well known that the first colonies in America were settled by religious dissenters who fled from Europe and England to escape religious persecution and intolerance. In Sixteenth and Seventeenth Century England, Henry VIII and his daughter Elizabeth I persecuted the Catholics and certain Protestant sects such as the Puritans and the Unitarians, while Queen Mary persecuted the Protestants. At the same time, there was civil war in France between the Catholics and the Huguenots. And in Germany, Hapsburg attempts to restore Catholicism were resisted in twenty-five years of fighting.

The fact that the earliest settlers fled from the Old World to escape religious persecution and strife did not prevent them from establishing official religions in their New World communities and colonies. Established religions were commonplace in colonial America. For example, the pilgrims at Plymouth Rock who set up a Puritan community were fleeing persecution in England. By the time of the Revolution in 1775, nine of the thirteen colonies had established religions: Anglicanism was the established religion in Maryland, Virginia, North Carolina, South Carolina and Georgia. Congregationalism was established in Massachusetts, New Hampshire and Connecticut. And in New York, each township was actually obligated to support a Protestant church and minister. Twelve years later, when the Constitutional Convention convened in 1787, only five colonies still had established religions: Georgia, South Carolina, Connecticut, New Hampshire and Massachusetts.[7]

One leading historian[8] examined references to religion in the state constitutions of each of the first states in the nation in the Eighteenth Century. Both Maryland and Georgia authorized taxation for religion. South Carolina established the Christian-Protestant religion as the official state religion. In New Jersey, although each individual had the right to worship as he pleased, only Protestants could hold office in the state legislature. The Vermont constitution "urged every sect or denomination to observe the Sabbath." Several states required government officials to take an oath professing belief in God or divine inspiration of the Bible or belief in a particular religion.

While most states gave preferential treatment to a particular Protestant sect or the Protestant religion in general, Virginia and Rhode Island were the only two states that prohibited the establishment of any religion so there was a complete disestablishment of religion. The disestablishment of religion in Virginia was the exception rather than the rule in church-state relationships in the late Eighteenth Century. Furthermore, disestablishment of the Anglican Church—the Church of England—was not just religiously motivated, but politically motivated. It is not surprising that the men who fought for independence from England would not want the Church of England to be the established religion in their new homeland.

It seems clear from the foregoing that the framers of the First Amendment envisioned that state authority over religion would continue. The adoption of the Bill of Rights did not change state jurisdiction over religion. Listed below are several examples of actions by the drafters of the First Amendment which demonstrate that the adoption of the First Amendment did not mean the federal government was totally powerless to enact laws concerning religion—it simply could not establish a national religion or interfere with the state established religions. These examples show the framers *never* intended an absolute separation of church and state.

First, many of these same statesmen who approved the Declaration of Independence July 4, 1776 also participated in the adoption of the Constitution. The language of the Declaration certainly expresses faith in a Supreme Being. It reads in part:

> When in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the laws of Nature and of Nature's God entitles them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation ... We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain inalienable rights.

Second, from the very first Congress under the Constitution there has always been a chaplain in the House of Representatives and the Senate to open each session with a prayer. James Madison was a member of the Committee that recommended a chaplain for the House of Representatives. On May 1, 1789, the House elected Rev. William Linn as chaplain and appropriated $500 for his salary. Similarly, the Senate approved a chaplain system April 25, 1789. Only several months later these same Members of Congress reached a final agreement on the language of the Bill of Rights. Recently, Chief Justice Burger agreed that the federal and state chaplain systems do not violate the Establishment Clause of the First Amendment further indicating the framers did not envision or intend absolute separation of church and state. Chief Justice Burger writing for the court in *Marsh v Ernest Chambers* said:

> Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and giving prayers as a violation of that amendment for the practice of opening sessions with prayer have continued without interruption ever since that early session of Congress.[9]

Third, the fact that the earliest American statesmen signed treaties with the Indians providing them with missionaries shows that they never intended an absolute separation of church and state. For example, President Thomas Jefferson signed into law three extensions of an Act which among other things provided "for the society of United Brethren for propagating the gospel among the heathen."[10] In effect, the United States government after adopting the First Amendment approved and financed programs to spread Christianity among the Indians. President Jefferson also asked the Senate to ratify a treaty with the Kaskaskia Indians which provided the Indians with $100 a year for seven years for a Catholic priest and $300 for a Catholic church. As late as 1833, President Andrew Jackson, in a treaty with the Kickapoo Indians, provided $3700 of government money to build a mill and church for the Indians.

Fourth, the fact that most American Presidents, beginning with President George Washington, signed Thanksgiving Day proclamations shows that the framers never intended an absolute separation of church and state. For example, on October 3, 1789, George Washington signed the first Thanksgiving Day Proclamation which said in part:

> Whereas it is the duty of all nations to acknowledge the providence of Almighty God, to obey his will, to be grateful for his benefits, and humbly to implore His protection and favor . . .[11]

It further read:

> Now, therefore, I do recommend and assign Thursday, the 26th day of November next, to be devoted by people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care and protection of the people of this country previous to their becoming a nation.[12]

James Madison, who drafted the First Amendment, also signed Thanksgiving Day proclamations. Much is made of the fact that President Jefferson did not sign Thanksgiving Day proclamations. While President Jefferson was opposed to the President issuing such a proclamation of thanksgiving, he acknowledged the fact that under the Constitution the states had power and authority over religious activities. This sentiment was evidenced in his second Inaugural Address which read in part:

> In matters of religion I have considered that its free exercise is placed by the Constitution independent of the powers of the general government. I have therefore undertaken on no occasion to prescribe the religious exercises suited to it, but have left them, as the Constitution found them, under the direction and discipline of the church or state authorities acknowledged by the several religious societies.[13]

Finally, the enactment of the *Northwest Ordinance* in 1787 by the last Congress of the Confederation providing that religion and morality should be encouraged in the public schools further demonstrates that the framers never intended "strict separation" between church and state. The *Northwest Ordinance* which provided for the establishment of public schools read in part:

> Art. I. No person, demeaning himself in a peaceable and orderly manner

> shall ever be molested on account of his mode of worship or religious sentiments, in the said territory.
>
> Art. III. Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall be forever be encouraged.[14]

The same men who enacted this ordinance adopted the First Amendment two years later.

It seems apparent that the original objective of the First Amendment was not to mandate strict separation between church and state, but rather to prohibit the establishment or creation of a national religion, to leave the states free to enact laws respecting religion and to guarantee each individual the freedom to believe as he chooses. This was the general understanding of the First Amendment until 1947. As might be expected, many states did enact laws regarding religion. Massachusetts had required Bible reading in the schools since 1826, and between 1913 and 1930, eleven more states enacted similar statutes.[15]

Justice Black's Misinterpretation of the First Amendment

From 1791 to 1947 there was no doubt about the meaning of the First Amendment. The first modern Supreme Court case dealing with the Establishment Clause was *Everson v. Board of Education.*[16] No prior decision had given full consideration to the meaning of the Establishment Clause. This landmark case involved a New Jersey statute which reimbursed all parents whose children took public transportation to school—either public or private—for the bus transportation costs. This statute was challenged as an unconstitutional violation of the Establishment Clause. It was argued that taxpayers money was being used to support and maintain Catholic schools because parents of children in private schools, most of whom were Catholic, were being reimbursed for school transportation costs. While the Supreme Court decided five to four to uphold the statute, thus permitting parents of private school children to be reimbursed for transportation costs, the court's rationale paved the way for all the modern court decisions mandating a strict separation of church and state.

Justice Hugo Black's decision in the *Everson* case marks the beginning of the misinterpretation of the First Amendment Establishment Clause which has resulted in the unreasonable, unfounded decisions of the last forty years including the Court's prohibition on voluntary school prayer. Justice Black's interpretation of the Establishment Clause is inconsistent with the intent of the framers. First, Justice Black makes the First Amendment applicable to the States when it was intended to apply only to the federal government. Second, Justice Black interprets the Establishment Clause to mean what he would have intended had he—not the framers—adopted the First Amendment. Black justified his interpretation of the First Amendment not by looking at the U.S. congressional debates, but by looking at the disestablishment of the Anglican church in Virginia.

Justice Black's first mistake was assuming the Establishment Clause of the First Amendment applied to the states. To understand how this happened it is necessary to examine the judicially created "doctrine of incorporation." Basically, the "doctrine of incorporation" means that when Congress adopted and the states ratified the Fourteenth Amendment they intended to make the Bill of Rights applicable to the states. In other words, according to this judicial doctrine, the "due process" clause of the Fourteenth Amendment was a shorthand way of making the Bill of Rights applicable to the States. This judicial interpretation of the Fourteenth Amendment has given the federal courts most of their power and business. The relevant section of the Fourteenth Amendment is:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall *abridge the privileges or immunities of* citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*

In 1925, in *Gitlow v. New York*, 268 U.S. 652, the Supreme Court began the process of selectively incorporating the Bill of Rights into the Fourteenth Amendment thereby making the prohibitions in the first ten amendments applicable to the states. Slowly but surely, the other provisions of the Bill of Rights have been incorporated into the Fourteenth Amendment and made applicable to the states.[17] This is a primary example of judicial activism —of the judicial branch usurping the legislative law-making function. Despite the fact that the Bill of Rights was intended to *restrict only the federal government* and not the individual state governments, the courts, in applying the doctrine of incorporation for the last sixty years, have forced the state governments to comply with the restrictions embodied in the first ten amendments.

Several historians and legal scholars have studied congressional debates and the debates of the state legislatures when ratifying the amendment to determine the scope and meaning of the Fourteenth Amendment.[18] Nowhere in the history of the Fourteenth Amendment was there any indication that Congress intended to make the Bill of Rights applicable to the states. Surely if the states understood that by ratifying the Fourteenth Amendment they were subjecting themselves to the prohibitions in the Bill of Rights they would have said so. Had the Fourteenth Amendment extended the Bill of Rights to the states, many states would have been required to make immediate changes in their criminal laws. One legal scholar, Professor Raoul Berger, points out that the state legislatures never would have ratified the Fourteenth Amendment if they thought it was intended to make the Bill of Rights applicable to them. Raoul Berger notes:

> The freedom that the states traditionally have exercised to develop their own systems of administering justice, repels any thought that the federal provisions on grand jury, criminal jury, civil jury were fastened upon them in 1868. Congress would not have attempted such a thing, the country would not have stood for it, the legislatures would not have ratified it.[19]

Also, Supreme Court decisions both prior to and subsequent to the adoption and ratification of the Fourteenth Amendment in 1868 by the Thirty-ninth Congress indicate there was no intent by the Congress to make the Bill of Rights applicable to the states. For example, before adoption of the Fourteenth Amendment there was no question but that the Bill of Rights applied solely to the federal government. The Supreme Court enunciated this principle in *Barron v. Baltimore*:

> But it is universally understood, it is a part of the history of the day, that the ~~great~~ revolution which established the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments.
>
> In compliance with a sentiment thus generally expressed, the quiet fears were thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the States. *These amendments contained no expression indicating an intention to apply them to the state governments.* This court cannot so apply them.[20]

Similarly, after the ratification of the Fourteenth Amendment, the Supreme Court continued to hold that the Bill of Rights was meant to restrict only the federal government and not the individual state governments. For example, in 1875, in *U.S. vs. Cruikshank*, the court noted:

> The First Amendment to the Constitution prohibits Congress from abridging the right of the people to assemble and to petition the government for a redress of grievances. This like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the state governments in respect to their own citizens, but to operate upon the National government alone.[21]

The court went on to say:

> It is now too late to question the correctness of this construction. They left the authority of the states just where they found it, and added nothing to the already existing power of the United States.[22]

Also, just three years before beginning the selective process of incorporation with the *Gitlow* case, the Supreme court noted:

> But as we have stated, neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the states any restriction about "freedom of speech" or the "liberty of silence"; nor, may we add, does it confer any right of privacy upon either persons or corporations.[23]

Even more concrete evidence that the Fourteenth Amendment was never intended to incorporate the Bill of Rights was the *Blaine Amendment* introduced in Congress in 1876. Senator James Blaine from Maine, at the request of President Ulysses S. Grant, introduced the following amendment which would have prohibited the *states* from making any law with respect to an establishment of religion:

> No state shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust under any state. No public property, and no public revenue of, nor any loan of credit by or under the authority of the United States or any state, territory, District, or municipal corporation, shall be appropriated to, or made or used for, the support of any school, educational, or other institution, under the control of any religious or anti-religious sect, organization or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect, organization, or denomination shall be taught. And no such particular creed or tenets shall be read or taught in any school or institution supported in whole or in part by such revenue or loan of credit; and no such appropriation or loan of credit shall be made to any religious or anti-religious sect, organization or denomination, or to promote its interests or tenets. This article shall not be construed to prohibit the reading of the Bible in any school or institution; and it shall not have the effect to impair rights of property already invested. . . .[24]

This amendment passed in the House of Representatives but failed in the Senate. Between 1950 and 1970, Congress twenty-five times rejected similar amendments which would have prohibited states from enacting laws with respect to an establishment of religion.[25] At the very least, the Blaine Amendment demonstrates that the framers of the Fourteenth Amendment never intended the incorporation of the First Amendment

Twenty-three Members of Congress who considered the Blaine Amendment were members of the Thirty-ninth Congress which passed the Fourteenth Amendment. One would think at least one of these twenty-three Congressmen would have said "This has been done. Being present in the Congress at the adoption of the Fourteenth Amendment, I can tell you the Fourteenth Amendment incorporated the Bill of Rights. The Fourteenth Amendment already makes the First Amendment applicable to the states." Of course, no such argument was ever made simply because that is not what the Fourteenth Amendment was intended to do. This should prove conclusively that the courts are *wrong* when they apply the First Amendment to the states.

In sum, when Justice Black announced that the Establishment Clause of the First Amendment applied to the states, he disregarded the understanding of the state legislatures which ratified the Fourteenth Amendment. He disregarded Supreme Court precedent on the scope of the First and Fourteenth Amendments and the rejected Blaine Amendment. Instead, Black applied his own rule—the Establishment Clause is incorporated into the Fourteenth Amendment and is applicable to the states.

Justice Black's second mistake in the *Everson* case was misinterpreting the original meaning of the First Amendment. In broad, sweeping language, Black said the Establishment Clause meant at least this:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, *aid all religions*, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious belief or disbelief, for church attendance or non-attendance. *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.* In the words of Jefferson, the clause against establish-

> ment of religion was *intended to erect a "wall of separation between church and State. . . ."*[26]

Some statements in this sweeping definition are accurate: the federal government cannot set up a church or prefer one religion over another. No person can be punished for professing a certain religious belief. But other statements cannot be justified by the original meaning of the Establishment Clause. Black says the Federal Government and the states *cannot* pass laws which aid all religions. However, as was noted earlier, the state governments were always free to determine their own policy on religion including establishing a religion if they chose and while the federal government cannot establish a religion by preferring one sect over another, it can and has in fact aided religion in general.

The question is how could Justice Black justify such a broad interpretation of the Establishment Clause? Black attempts to explain his broad interpretation using historical data. He quotes from selected writings of Thomas Jefferson and James Madison who lead the disestablishment of religion movement in Virginia. As will be shown, Black's reading of history is incomplete. He relies on the history of disestablishment in Virginia to the exclusion of the more authoritative U.S. congressional debates on the First Amendment and he overemphasizes certain writings of Jefferson and Madison to the exclusion of other documents.

As noted earlier, one of the most quoted phrases in any discussion on church-state issues is that the First Amendment was intended to "build a wall of separation between church and state." Justice Black referred to the "wall of separation" in his *Everson* decision. Where did this language come from? In 1802, in a letter to a group of Baptists in Danbury, Connecticut, Thomas Jefferson wrote in part:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinion, I contemplate with solemn reverence that act of the whole American People which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," *thus building a wall of separation between church and state.*[27]

While this language is often used to defend the principle of absolute separation between church and state it was never intended to support any interpretation of the First Amendment. It was merely a phrase used in a letter to a constituent. Admittedly, Jefferson did believe in the separation of church and state. After all, Madison and he led the fight to disestablish the Anglican church in Virginia. But the question is did he intend an *absolute* separation of church and state?

As mentioned earlier, as President, Jefferson signed several treaties with different Indian tribes which provided for federal government money to the Indians for churches and missionaries. The money was going to aid religions in general, and apparently Jefferson did not see this as a violation of the Establishment Clause.

Additionally, when establishing the University of Virginia, Jefferson suggested that sectarian schools be established on the confines of the University so that those students could take advantage of the courses and instruction at the University. This hardly evidences a Jefferson who believed in *absolute* separation of church and state. Jefferson explained he wanted those pursuing religious studies to be able to take advantage of the University courses:

> It was not, however, to be understood that instruction in religious opinion and duties was meant to be precluded by the public authorities, as indifferent to the interests of society. On the contrary, the relations which exist between man and his Maker, and the duties resulting from those relations, are most interesting and important to every human being, and most incumbent on his study and investigation. The want of instruction in the various creeds of religious faith existing among our citizens presents, therefore, a chasm in a general institution of the useful sciences . . . A *remedy, however, has been suggested of promising aspect, which, while it excludes the public authorities from the domain of religious freedom, will give to the sectarian schools of divinity the full benefit the public provisions made for instruction in the other branches of science* . . . It has, therefore, been in contemplation, and suggested by some pious individuals, who perceive the advantages of associating other studies with those of religion, *to establish their religious schools on the confines of the University, so as to give to their students ready and convenient access and attendance on the scientific lectures of the University*; and to

> maintain, by that means, those destined for the religious professions on as high a standing of science, and of personal weight and respectability, as may be obtained by others from the benefits of the University. . . . Such an arrangement would complete the circle of the useful sciences embraced by this institution, and would fill the chasm now existing, on principles which would leave inviolate the constitutional freedom of religion, the most inalienable and sacred of all human rights, over which the people and authorities of this state, individually and publicly, have ever manifested the most watchful jealousy; and could this jealousy be now alarmed, in the opinion of the legislature, by what is here suggested, the idea will be relinquished on any surmise of disapprobation which they might think proper to express.[28]

Today, the Court would hold that permitting religious schools to establish themselves on the confines of a public university would constitute *aid to religion* and thereby violate the Establishment Clause. Indeed, the court had considered a case where religious instruction was made available on public school property. In *McCollum v. Board of Education*,[29] Justice Black again writing for the Court, invalidated an Illinois statute permitting religion teachers to come weekly into the school buildings during regular hours to provide religious instruction. Although the "released time program" was completely voluntary, the Court held that permitting religious instruction on public school property was aiding religion and in violation of the Establishment Clause. Given Jefferson's suggestion about the University of Virginia, it seems he would have decided the *McCollum* case differently.

Justice Black also quoted James Madison's *Memorial and Remonstrance Against Religious Assessments* (1785)[30] which antedates the First Amendment by four years and which was never offered as an interpretation of the First Amendment. In fact, it was Madison's response to a bill before the Virginia Assembly which if enacted would have required all Virginia taxpayers to support teachers of the Christian religion. Madison argues more against the government giving preferential treatment to one religion rather than arguing against any government aid to religion. Madison shows he understands an "establishment of religion" to mean preferential treatment towards one religion—not prohibiting any aid to religion.

A leading historian, Robert L. Cord, suggests that Madison's *Memorial* is over-emphasized in trying to discern Madison's position on church-state issues. Cord notes two bills introduced by Madison in the Virginia Assembly on October 31, 1785 which indicate he did not interpret the First Amendment to mean an absolute separation between church and state.

First, Bill No. 84, "A Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers," intended to punish those who worked on Sunday. The bill enacted into law in 1786 provided:

> 84. A Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers
>
> Be it enacted by the General Assembly, that no officer, for any civil cause, shall arrest any minister of the gospel, licensed according to the rules of his sect, and who shall have taken the oath of fidelity to the commonwealth, while such minister shall be publicly preaching or performing religious worship in any church, chapel, or meeting-house, on pain of imprisonment and amercement, at the discretion of a jury, and of making satisfaction to the party so arrested.
>
> And if any person shall of purpose, maliciously, or contemptuously, disquiet or disturb any congregation assembled in any church, chapel, or meeting-house, or misuse any such minister being there, he may be put under restraint during religious worship, by any Justice present, which Justice, if present, or if none be present, then any Justice before whom proof of the offence shall be made, any cause the offender to find two sureties to be bound by recognizance in a sufficient penalty for his good behavior, and in default thereof shall commit him to prison, there to remain till the next court to be held for the same county; and upon conviction of the said offence before the said court, he shall be further punished by imprisonment and amercement at the discretion of a jury.
>
> *If any person on Sunday shall himself be found labouring at his own or any other trade or calling, or shall employ his apprentices, servants or slaves in labour, or other business, except it be in the ordinary houshold* [sic] *offices of daily necessity, or other work of necessity or charity, he shall forfeit the sum of ten shillings for every such offence, deeming every apprentice, servant, or slave so employed, and every day he shall be so employed as constituting a distinct offence.*[31]

A second bill, Bill No. 85, " A Bill for Appointing Days of Public Fasting and Thanksgiving," was not enacted into law but would have imposed a fine on any "minister of the gospel" who without an excuse failed to issue such a proclamation. The bill read:

> 85. A Bill for Appointing Days of Public Fasting and Thanksgiving
>
> Be it enacted by the General Assembly, that the power of appointing days of public fasting and humiliation, or thanksgiving, throughout this commonwealth, may in the recess of the General Assembly, be exercised by the Governor, or Chief Magistrate, with the advice of the Council; and such appointment shall be notified to the public, by a proclamation, in which the occasion of the fasting or thanksgiving shall be particularly set forth. Every minister of the gospel shall on each day so to be appointed, attend and perform divine service and preach a sermon, or discourse, suited to the occasion, in his church, *on pain of forfeiting fifty pounds for every failure, not having a reasonable excuse.*[32]

These two bills introduced by Madison, the fact that he signed four Thanksgiving Day Proclamations and was a member of the House committee that recommended a chaplain system serve as evidence that he could *not* have believed Black's absolute separation of church and state principle at the time the First Amendment was adopted.

Some historians judge Madison on his *Detached Memoranda* in which he condemns chaplains and argues for a broader interpretation of the First Amendment so that it should "forbid anything *like* an establishment of religion."[33] Other scholars refuse to place too much emphasis on the *Memoranda* since it was written five years after Madison left the presidency and it contradicts his earlier actions as a congressman and President. Robert L. Cord writes:

> Obviously the Madison of the *Detached Memoranda* is not the Madison responsible for the First Amendment nor the President who issued Proclamations of Days of Thanksgiving and Prayer.[34]

Professor Corwin says: "In his later years Madison carried the principle of church and state to pedantic lengths."[35]

In sum, because Justice Black attempts to justify his broad interpretation on historical data he should have analyzed more fully the history surrounding the First Amendment. Robert L. Cord, who thoroughly investigated the history of the First Amendment in his book *Separation of Church and State: Historical Fact and Current Fiction* wrote:

> It is time for the Supreme Court to discontinue promulgating a distorted version of American history brought into being, and carefully maintained, by the selection and omission of primary historical sources.[38]

Those who believe in religious liberty and freedom of religion may have won a small battle in the *Everson* case, but as history shows us they lost the war. This landmark case paved the way for the court's decision in 1962 to prohibit voluntary school prayer which would have been impossible without Black's broad interpretation of the Establishment Clause based on a selective review of history and his desire to make the Establishment Clause applicable to the States.

Chapter 1 Footnotes

[1] *Adamson v. California*, 332 U.S. 46 (1947) at p. 63.

[2] Paul Brest "The Misconceived Quest for the Original Understanding" *Boston University Law Review*, Vol. 60, p. 204 (1980).

[3] This interpretation of the First Amendment is discussed by: James B. McClellan, "The Making and Unmaking of the Establishment Clause," in Patrick B. McGuigan and Randall R. Rader, eds., *A Blueprint for Judicial Reform* (Washington, D.C.: Free Congress Foundation, 1981), pp. 295-326; Peter J. Ferrara, *Religion and the Constitution: A Reinterpretation* (Washington, D.C.: Free Congress Foundation, 1983); Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (New York: Lambeth Press, 1982); Joseph Story, III *Commentaries on the Constitution* sections 1864 thru 1873 (1833).

[4] Joseph Story, III *Commentaries on the Constitution* section 1871 (1833) (Emphasis added.)

[5] Ibid., Section 1873 (Emphasis added.)

[6] Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (New York: Lambeth Press, 1982) p. 49; James B. McClellan, "The Making and Unmaking of the Establishment Clause," in Patrick B. McGuigan and Randall R. Rader, eds., *A Blueprint for Judicial Reform* (Washington, D.C.: Free Congress Foundation, 1981) p. 295.

[7] McClellan, in *A Blueprint for Judicial Reform*, pp. 300-308, and Cord, *Separation of Church and State* p. 4.

[8] McClellan, in *A Blueprint for Judicial Reform*.

[9] *Marsh v. Ernest Chambers* (no. 82-83) 51 L.W. 5162, June 28, 1983.

[10] Cord, *Separation of Church and State*, p. 45 citing Public Statutes at Large, Vol. I, "Acts of the Fourth Congress," Sess. I, Chap. 46, pp. 271-72.

[11] James D. Richardson, *A Compilation of the Messages and Papers of the Presidents*,

1789-1897, Vol. I (Washington, D.C.: Bureau of Literature and Art, 1901) p. 64.

[12] Ibid., p. 64.

[13] Edward S. Corwin, "The Supreme Court As National School Board," *Law and Contemporary Problems*, Vol. 14, p. 14 (1949) citing I *Messages and Papers of the Presidents* (Richardson ed. 1896).

[14] Swanson, "Religion in Public Schools; *Nebraska Law Review*, Vol. 59, p. 425 (1980) at p. 436 citing 1. stat. 52 (July 13, 1787).

[15] McClellan, in A *Blueprint for Judicial Reform*, p. 311.

[16] *Everson v. Board of Education*, 330 U.S. 1, (1947).

[17] In 1937, in *De Jonge V. Oregon* (299 U.S. 353) the guarantee of freedom of assembly was made applicable to the states. In 1940, in *Cantwell v. Connecticut* (310 U.S. 296) the freedom of religion was made applicable to the states. In 1947, in *Everson v. Board of Education* (330 U.S. 1) the Establishment Clause of the First Amendment was made applicable to the states. In 1949, in *Wolf v. Colorado* (338 U.S. 25) the Fourth Amendment right to be free from unreasonable searches and seizures was made applicable to the states. In 1981, in *Mapp v. Ohio* (367 U.S. 643) the Fourth Amendment right to exclude from criminal trials evidence seized illegally was made applicable to the states. In 1962, in *Robinson v. California* (370 U.S. 660) the Eighth Amendment prohibition against cruel and unusual punishment was made applicable to the states. In 1963, in *Gideon v. Wainright* (372 U.S. 335) the Sixth Amendment right to counsel was made applicable to the states. In 1964, in *Malloy v. Hogan* (378 U.S. 1) the Fifth Amendment right against self-incrimination was made applicable to the states. In 1965, in *Pointer v. Texas* (380 U.S. 400) the Sixth Amendment right of a criminal defendant to confront the witnesses against him was made applicable to the states. Also in 1965, in *Griswold v. Connecticut* (381 U.S. 479) the Ninth Amendment implied right to privacy was made applicable to the states.

[18] The most notable is Charles L. Fairman, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" *Stanford Law Review*, Vol. 2, p. 5 (1949) Note also: Raoul Berger; *Government by Judiciary: The Transformation of the Fourteenth Amendment*. (Cambridge, Mass: Harvard University Press, 1977): Robert L. Cord, "Neo-Incorporation: The Burger Court and the Due Process Clause of the Fourteenth Amendment" *Fordham Law Review*, Vol. 44, p. 215 (1975).

[19] Berger, *Government by Judiciary*, p. 156, n. 95 quoting Fairman, Standford 137.

[20] *Barron v. Baltimore* 32 U.S. (7 Peters) 242 (1833).

[21] *U.S. v. Cruikshank* 92 U.S. 542 (1875) p. 551.

[22] Ibid., p. 552.

[23] *Prudential Insurance Co. v. Cheek*, 259 U.S. 530, p. 543 (1922).

[24] House Resolution 1, 44th Congress, 1st Session (1876).

[25] Joseph H. Brady, *Confusion Twice Confounded: The First Amendment and the Supreme Court* (South Orange, N.J.: Seton Hall University Press, 1954), p. 35.

[26] *Everson v. Board of Education*, 330 U.S. 1 (1947) at pp. 15-16.

[27] *Everson v. Board of Education*, 330 U.S. 1 (1947) at p. 16. Full text of the letter:

Saul K. Padover, *The Complete Jefferson* (Freeport, N.Y: Books for Libraries Press, 1943), pp. 518-19. (Emphasis added.)

[28] Corwin, "The Supreme Court As National School Board," p. 14. (Emphasis added.)

[29] *McCollum v. Board of Education*, 333 U.S. 203 (1948).

[30] *McCollum v. Board of Education*, 333 U.S. 203 (1948).

[31] Cord, *Separation of Church and State*, p. 217 citing Boyd, *The Papers of Thomas Jefferson*, pp. 305-7.

[32] Ibid., p. 220.

[33] For example, Leo Pfeffer, *Church, State and Freedom* (Boston: Beacon Press, 1967) Leo Pfeffer, *God, Caesar and the Constitution* (Boston: Beacon Press, 1975) and Supreme Court Justices Rutledge and Black.

[34] Cord, *Separation of Church and State*, p. 36.

[35] Corwin, "The Supreme Court as National School Board."

[36] Cord, *Separation of Church and State* p. 223.

Religion and the Constitution
A Reinterpretation

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Chapter 2: The Original Intent

Issues of church and state played a central role in the very founding of this country. It was largely to escape from the religious wars and persecution of Europe that the earliest settlers came to America, and this remained an important motivation thereafter. The character and concerns of these early settlers in turn played a key role in the contours of early American culture and government.

Historical Experience

A brief understanding of this history provides a useful perspective on the issues discussed in this book. By the 16th century, Catholicism was interwoven with government throughout Western Europe as the official, established church of virtually every kingdom, sometimes providing more legitimacy and support to the secular government than vice versa. The Protestant Reformation, however, begun in the early 16th century in Germany by Martin Luther challenged the primary religious authority of the Catholic Church and the Pope. This sparked religious strife all across Europe.

In England,[1] this strife combined with the incendiary personality of King Henry VIII. Henry's Spanish Catholic wife, Catherine, had failed to bear him a male heir, and he had fallen in love with Anne Boleyn anyway. He asked the Pope to annul the first marriage so he could marry Anne. But Catherine's powerful friend, King Charles V of Spain, prevailed upon the Pope to refuse the request. Eventually, this led Henry to disestablish Catholicism as the official Church of England, establishing the Anglican Church instead, with Henry as the head. He then annulled his own marriage and married Anne.

The law required payments to the new church, professed allegiance to its doctrines, and attendance at its ceremonies, as it had previously for Catholicism. Those who resisted were often beaten, jailed, hanged or burned at the stake. The Anglican Church followed all the traditional Catholic rites, except recognition of the Pope. This led to the ironic government persecution of Catholics who refused to accept the new church, and of Protestant dissenters who believed it did not go far enough in rejecting Catholic practices. In one reported instance, Henry had three Protestants and three Catholics burned at the stake at the same time.[2]

Henry was succeeded by his son Edward, but because of his frail health, Edward died soon thereafter. This brought the Catholic Mary, daughter of Henry's first wife Catherine, to the throne. Mary soon brought Catholicism back as England's official religion and, after a period of religious tolerance, began persecuting Protestants with a vengeance that earned her the title "Bloody Mary." But Mary was frail as well, and she also died after a short reign.

This brought the Protestant Elizabeth, daughter of Anne Boleyn, to the throne, and she completely turned the tables. Reestablishing the Anglican Church, she banned Catholic worship and arrested and even executed many Catholic priests, as well as Catholic sympathizers. During a reign of 45 years, she also similarly persecuted dissenting Protestant sects such as the Unitarians, Anabaptists, Quakers, Puritans, and others.

Because Elizabeth had no children, Protestant King James of Scotland next became King of England. He basically pursued the persecution policies of Elizabeth but with some leniency. During his reign, Catholics tried to blow up Parliament with gunpowder stored in the cellar. The plot failed, but left England with a new holiday—Guy Fawkes Day—named after the ring leader.

James was succeeded by his son, Charles I, nominally a Protestant, but subject to the influence of his French Catholic wife, Henrietta Maria. Her support for Catholics and for the reestablishment of Catholicism helped to undermine public and parliamentary support for the eventually doomed king. The King's appointment of William Laud as Chief Archbishop of the official Anglican Church, who adhered strictly to Catholic doctrine apart from Pope allegiance and especially persecuted Protestant dissenters, was also highly detrimental. It was really a dispute over taxes and the powers of Parliament versus the crown that led to the Great Rebellion of the 1640s. But the fighting actually started when the Scottish Presbyterians revolted against Anglican impositions supported by Charles. Religious disputes between King and Parliament fanned the flames, and when Parliament raised an Army to fight Charles, it was the now powerful Puritans and Presbyterians that swelled the ranks with dedicated warriors who fought their way to victory. In 1649, the defeated King was beheaded.

Absolute authority then rested for a time with Parliament, and then for a while with the rebel army leader, Oliver Cromwell. The Puritans during this time were in control, through Cromwell. They persecuted the Catholics more viciously than ever. They fought, and prevailed, over the rebellious Presbyterian Scots. They persecuted Anglicans, Unitarians, and other Protestants. They banned the theater, exacted the death penalty for adultery, and mandated that Sundays be reserved exclusively for religious observances.

But upon Cromwell's death in 1658, a leaderless and chaotic nation turned to the beheaded King's son, Charles II, to accept the throne. Charles reestablished the Anglican Church, and its ministers and supporters in Parliament took the lead in reestablishing persecution of Catholics and Protestant dissenters, particularly the Puritans and Quakers. But Charles and his heir apparent brother James, raised by their French Catholic mother Henrietta Maria, secretly plotted with the King of France to reestablish Catholicism in England. Public suspicion of such a plot led to a reign of terror against Catholics. Protestant nobles plotted rebellion. Before this could gather steam, however, Charles died, and the far more zealous James became king.

Unsuccessful rebellions broke out against James. When peace was restored, James boldly took steps to replace the established Anglican Church with the Catholic Church. He promised tolerance for all non-Catholics, but the populace did not believe him. The final straw was an apparently innocent event—the King's wife gave birth to a son. But the newborn child, certain to be raised as a Catholic, became heir apparent, superceding the claim to the throne by James's Protestant daughter Mary, married to William of Orange, ruler of Protestant Netherlands. The Protestant English nobility invited William to invade England. He obliged, and when King James could find no one to defend him, he fled to France. William and Mary were named King and Queen. The Dutch King, disinterested in domestic English politics, allowed a permanent historic transfer of power from Crown to Parliament.

All this violence and bloodshed was only the story of one country. Even more violent and bloody were the Spanish inquisition, the French persecution of the Huguenots, and religious wars in Germany. Refugees from this European religious turmoil provided a steady flow of new settlers for England's American colonies.

The first permanent English settlement in America,[3] Jamestown, established in 1607, was the result of a monied expedition launched by investors hoping to make a profit from the new colony, with the official blessing of the English government. The fabled Sir Walter Raleigh, veteran of the English victory over the Spanish Armada in 1588, led the expedition. These "upper crust" beginnings resulted in the establishment of England's official Anglican Church in Virginia.

But the storied Pilgrims who landed at Plymouth Rock in 1620 were persecuted Puritans who had fled from England to the Netherlands before sailing to America. Just as the Puritans under Cromwell in England were to establish their own church, and legally mandate adherence once they gained power, the Plymouth Puritans were also not great believers in religious liberty. They saw their settlement in America as an opportunity to establish a new community where their ideals of worship could be put to practice, creating the perfect Puritan society. Observance of the Puritan religion was therefore required by law, and dissenters were not tolerated.

The lure of this religiously idealistic community, and the policy of vigorous persecution pursued by King Charles' Archbishop Laud in England, brought thousands more settlers to the new colony over the next two decades. The new Puritan settlers branched out, establishing the colony that became Connecticut in 1636. They spilled over into New Hampshire and Maine, colonies started by Crown favorites who did not follow through to maintain permanent settlements of their own. The Reverend Roger Williams, banished from Plymouth for heresy, led a band of various sects of dissenters from prevailing Puritan orthodoxy to establish Rhode Island. Greater religious liberty prevailed in Williams' colony, though its inhabitants were still generally Puritan and devout.

During the reign of Protestant Charles I, Catholic Lord Baltimore established the colony of Maryland. His son made the colony a refuge for English and Irish Roman Catholics. During the reign of Catholic King James II, Protestant Quaker William Penn led a stream of his fellow believers from all over Europe to establish the colony of Pennsylvania. Due to the pacifism of Penn and his Quakers, this colony became the most religiously tolerant. Though the founding of the Carolinas was secularly motivated, they were initially largely populated by Protestant Huguenot refugees fleeing the persecution of Catholic King Louis XIV of France.

Religion remained a dominant cultural factor in the colonies and by the time of the Revolution, nine of the thirteen colonies still had religious establishments. The Puritan Congregationalist Church was maintained in Massachusetts, New Hampshire, and Connecticut, and the Anglican Church in New York, Maryland, Virginia, North and South Carolina, and Georgia.[4] But the religious toleration first fostered by Penn in Pennsylvania and Rev. Williams in Rhode Island was gaining acceptance in the colonies, as it was in England itself. During the Revolutionary War and soon thereafter, New York, Georgia, North Carolina, and Virginia removed their religious establishments.[5] Yet, these reforms were probably due as much to anti-England sentiment during the revolution as newfound respect for religious freedom, as the Anglican Church disestablished in these states was the Church of England. Moreover, this still left five states with established religions by the time the First Amendment was drafted. In addition, in five of the other states there were still legal restrictions and burdens on certain beliefs relating to religion.[6]

The history of religious wars and violence associated with religious establishments in Europe is often cited as exhibiting the need for strong constitutional provisions against such establishments. This argument is indeed persuasive. But the practices that the Establishment Clause has been used to strike down in contemporary times seem quite remote from the troublesome religious establishments of reformation Europe, as we shall see in the following chapter. Moreover, such a rationale certainly doesn't justify discriminatorily excluding religious groups and activities from receiving the beneficial effects of government actions, denying them participation in general secular programs open to all others, or banning them from any contact with the public sector altogether.

This history also shows that the prevailing attitude towards church and state issues in the colonies grew out of, and did not involve a radical break with, the prevailing attitudes in Europe. The leading intellectual trends of the seventeenth century, at least in England, favored religious toleration, so it was only natural that the newly established colonies should exhibit greater religious liberty, reflecting the new fashions of the times. Moreover, the elements and the Indians in the New World served as common enemies, binding the settlers together and minimizing their differences. However the early settlers, with notable exceptions, still brought over and adopted the notion of state establishment of particular religions, with state imposed fealty and support. Religious establishment policies were followed with special vigor in New England. Religious toleration and freedom grew in America preceeding the Revolution, as it did in England during the same era, and throughout Europe. But by the time of the Revolution and creation of the Constitution, the notion of state establishment of religion was still accepted as proper by broad segments of the American public.

The Founding Fathers

The Constitution was originally drafted and sent to the states without the first ten Amendments, which comprise the Bill of Rights. The state ratifying conventions objected to this lack of specific protections, and though they ratified the proposed Constitution, they demanded that the first Congress pass a set of amendments listing various essential rights. Among these were rights relating to religion.

The state of Virginia asked that the Constitution be amended to provide that:

> . . . all men have an equal, natural and inalienable right to the free exercise of religion according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by law in preference to others.[7]

This identical language was used by the North Carolina ratifying convention[8], and, with minor changes, by the Rhode Island convention.[9] New York had recommended that the Constitution be amended to provide that "no religious sect or society ought to be favored or established by law in preference to others."[10]

What these states, and others, were asking for, besides a guarantee of religious liberty, was clearly that the new national government be prohibited from providing preferential aid or treatment for any one religion or group of religions. What they were essentially asking is that the Federal government be prohibited from *establishing* any one religion or group of religions, for such preferential aid or treatment was the essence of religious establishments.

The Federalists, supporting the Constitution and the creation of the national government, were eager to comply with the demands of the States, to maintain support for the new government. Like James Madison, they generally believed that such amendments were unnecessary, because the Federal government was to have only the powers delegated in the Constitution, and the national government had no delegated authority to infringe upon the rights that the states wanted to protect. But since they did not disagree that these rights should be secure from national government infringement, they were willing to provide the additional protection asked for by the states.[11]

James Madison took the lead in seeking passage of the amendment relating to religion, introducing as a member of the House of Representatives in the first Congress the following proposed language:

> The Civil Rights of none shall be abridged on account of religious belief or worship, *nor shall any national religion be established,* nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.[12] (emphasis added)

The language was later changed several times, but this initial proposal is interesting because it shows the intent of Madison, who is often cited as favoring very strict separation between church and state, and the elimination of all government aid or benefit to religion. If this is what Madison favored, why didn't he propose it in the clear, precise language for which he was famous? All he proposed was a ban on the establishment of religion. The intention of Madison, the Federalist, in proposing this amendment, remember, was not that he thought it was necessary, but to satisfy the states, which had requested a ban on preferential treatment. Madison's proposal basically satisfied the states' requests because that is what a ban on an establishment of religion would have amounted to in the lingo of the time (as noted above and as we shall see in more detail later). Madison understood these requests well, having been a member of the Virginia ratifying convention that proposed the no preference language noted earlier. Addressing the convention, Madison accepted the no preference concept, saying "it is sufficient to authorize a conclusion that no one sect will ever be able to outnumber or depress the rest."[13] It is also noteworthy that Madison's proposed amendment did not seek any restriction on state aid or favor for religion, proposing only a ban on the establishment of a *national* religion, which appears only to restrict Congress.

Madison's proposal was referred for consideration to a special Select Committee, which reported out the following language:

> No religion shall be established by law, nor shall the equal rights of conscience be infringed.[14]

In the ensuing debate on the amendment, it appears that there was general agreement as to what the substance of the amendment should be—protection for religious freedom, plus a ban on any establishment of religion, meaning preferential aid or treatment for one or more religions, by Congress, leaving the states free to adopt their own policies. The argument was over how to express this agreed intent in clear language.

In the first debate on the amendment, in the House on August 15, 1789, a concern was raised that the amendment's language might be construed as banning more than preferential aid or treatment, and result in harm to religion.[15] Madison, as a member of the committee proposing the language, rose to explain that it was intended merely to provide that "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[16] This apparently would not ban more than preferential treatment or aid, and Michael Malbin points out that by stating that Congress could not establish a religion, Madison was emphasizing this point.[17] Madison later expressed again the no preference intent behind the amendment, saying that its motivation was "that the people feared that one sect might obtain a predominance, or two combine together, and establish a religion to which they would compel others to conform."[18] Madison also said that he thought the language of the amendment, with its "establishment" phraseology, expressed the intent behind the amendment as well "as the nature of language would admit."[19]

A more serious issue was next raised by the Anti-Federalists, who were strong believers in states' rights. They were especially concerned that Congress should not have the power to overturn the state establishments of religion, which existed in at least five states at the time, or to modify state policies regarding religion in any way.[20] Indeed, the proposed amendment itself, phrased in the passive voice, could be construed as applying to the states themselves. It was apparently these concerns[21] that led Samuel B. Livermore of Puritan New Hampshire to propose that the amendment's language be changed to:

> Congress shall make no law touching religion, or infringing the rights of conscience.[22]

This would make it clear that the restriction applied to Congress, and that it could not touch state laws relating to religion, as well as being disabled from passing its own. Anti-Federalist leader Elbridge Gerry of Puritan Massachusetts supported this new language, and the House approved it in place of the Committee version by the end of the day.[23]

However, time for reflection apparently led to the realization that this language made it far less clear that Congress was merely prohibited from granting preferential treatment to religious sects. The House instead finally adopted a version suggested by Fisher Ames, from Puritan Massachusetts:

> Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience.[24]

With this language, it was still clear that state policies were not to be affected by the Amendment, because it expressly applied only to "Congress." Yet the highly ambigious word "touching," was eliminated in favor of the much clearer "establishing." At the very least, this also left Congress with no delegated authority to overturn state establishments or religious policies.

The Senate seemed particularly concerned to make the no preference intent as clear as possible. Though the floor debate was kept secret, the *Senate Journal* reveals that the Senate considered a number of rephrasings of the amendment on the same day, in rapid succession. This suggests that the Senate was trying to develop the proper phraseology to express an agreed intent, rather than debating the intent.

The Senate first defeated and then accepted a proposed substitute for the House version which read:

> Congress shall make no law establishing one religious sect or society in preference to others, or to infringe on the rights of conscience.[25]

The Senate then considered and rejected two modifications of this language:

> Congress shall not make any law infringing the rights of conscience, or establishing any religious sect or society.[26]

> Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.[27]

But by the end of the day, the Senate returned to the following language, similar to the House version:

> Congress shall make no law establishing religion, or prohibiting the free exercise thereof.[28]

However, those wanting to make sure that religion would not in any way be harmed apparently prevailed upon the Senate to change the amendment to the following before sending it back to the House:

> Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion.[29]

The House-Senate conference finally agreed on the version ultimately enacted:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

Madison, who was a member of the conference committee,[30] apparently convinced all that the word "establishment" was sufficiently widely understood to be used to express the no-preference intent that everyone seemed to agree was the object. It is hard to believe that the Senate, obviously deeply concerned about this issue, would have approved the amendment if it was not so convinced.

There are two key words in this final language which are crucial to a proper understanding of the Establishment Clause. The first of these is "respecting." To the modern reader, the phraseology "respecting an establishment of religion" seems awkward. "Respecting" has often been erroneously assumed to mean "tending toward" or "seeming like." But it was actually a very neat and clear solution to the important Federalism concern noted in the Congressional debates—that Congress be prohibited not only from setting up its own establishment of religion, but that it also be prohibited from interfering with the state establishments as well. If Congress could make no law *respecting an* establishment of religion, then it clearly could not touch the state establishments, nor set up its own. This was the clear intent of the framers.[31] Realization of this meaning sweeps away any real ambiguity in the Establishment Clause.

The second key word is "establishment" itself. This was a term of art familiar to the framers of the amendment, who lived with establishments in their times, and knew well the history of establishments in Europe that played such a major part in the early experience of the colonies. Professor Joseph Brady has elucidated the meaning of the word "establishment" as understood by the framers.[32] He first quotes historian Marcus W. Jernegan, noting:

> The general rule in those colonies having an established church was to require dissenters to support it by paying tithes or taxes, and also to attend the official church services under penalty. They were also frequently required to submit to various tests or oaths, and to subscribe to the creeds and catechisms of the established church. Sometimes the right to settle in a colony, or the privilege of naturalization, or citizenship, or the right to vote and hold office, depended on submission to religious tests. Moreover, opposition arose to the building of dissenting churches and to the preaching of doctrines contrary to those of the established church.[33]

As Brady writes, this is what the Founding Fathers "by personal knowledge and experience, understood an establishment to be; this is what they proposed, by the First Amendment, to prevent the Federal Congress from setting up for the whole nation."[34]

Brady also quotes the meaning of the word establishment as defined by the distinguished American constitutional lawyer Thomas M. Cooley:

> By establishment of religion is meant the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others . . . . It was never intended by the Constitution that the government should be prohibited from recognizing religion, or that religious worship should never be provided for in cases where a recognition of Divine Providence in the working of government might seem to require it, and where it might be done without drawing any invidious distinctions between different religious beliefs, organizations or sects . . . .[35]

The *Encyclopedia Brittanica*, also quoted by Brady, similarly defines establishment as follows:

> Perhaps the best definition which can be given, and which will cover all cases is that establishment implies the existence of some definite and distinctive relation between the state and a religious society (or conceiv-

> ably more than one) other than that which is shared in by other societies of the same general character. It denotes any special connection with the state, or privileges and responsibilities before the law, possessed by one religious society to the exclusion of others: in a word establishment is of the nature of a monopoly.[36]

Brady concludes, "Establishment, then, means recognition of one religion by the state, in preference to all others, and the according to that one of special privileges not shared by others."[37]

By using the word "establishment," the Founding Fathers thus clearly meant to prohibit any act of Congress that would provide preferential treatment for any one religion or group of religions. This interpretation is consistent not only with the contemporaneous meaning of the language, but with what the states requested that the amendment provide, and with the Congressional debates on the measure. Under this view, the amendment would, of course, serve to ban the creation of an official national religion, with the mandated financial support, profession of belief, attendance at ceremonies, and observance of tenets, along with the violent persecution of dissenters, that had marked the European establishments, and to a degree, the establishments in the early colonies. But it would not ban most of the actions that the Supreme Court has recently used the amendment to strike down, as we shall see.

Of course, since the final language of the amendment provided that "*Congress* shall make no law . . . ," its restrictions clearly were meant to apply only to the Congress, leaving the states absolutely free to adopt whatever policies relating to religion they might choose.

While the meaning of the Establishment Clause intended by the Founding Fathers should therefore be absolutely clear, there is less certainty as to the intended meaning of the Free Exercise Clause. The Congress did not debate this clause, and no Federal action or debates concerning it arose until almost 100 years later in certain Supreme Court opinions. Nevertheless, because the words of the clause themselves are straightforward, and through some evidence brilliantly highlighted by Michael Malbin[38] (though my interpretation of this evidence sometimes differs from Malbin's), it appears that the original intent behind this clause can be sufficiently determined.

Since the clause protects the free *exercise* of religion, it is clear that it protects opinions *and* actions relating to religion. But how far does this protection extend?

In regard to opinion, the Founding Fathers were fond of repeating the quite valid point expressed by John Locke in his *Letter Concerning Toleration*, which we noted in Chapter One—that the state had no ability to regulate opinion, because the force of arms could not control the inner beliefs of the mind.[39] A provision guaranteeing "the free exercise of religion" in the Virginia state constitution enacted in 1776 was prefaced with these words as explaining the reason for the clause: "That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, . . ."[40] This clause seemed to suggest that since opinion could not be coerced, it was useless to attempt to regulate it by law, and its absolute freedom was therefore guaranteed.

Thomas Jefferson, as third President of the United States, was making the same point about the practical inability to coerce belief when he wrote, "the legislative powers of government reach actions only, and not opinions."[41] Jefferson similarly wrote:

> Our rulers can have no authority over such natural rights, only as we have submitted to them. The rights of conscience we have never submitted, and could not submit. We are answerable for them to our God.[42]

The Founding Fathers thus appeared to intend that the Free Exercise Clause provide absolute protection for opinions relating to religion—individuals are free to believe whatever they want. The Federal government is prohibited from forcing individuals to profess belief in one doctrine or another, as governments often did in Europe and the early colonies.

In regard to *actions* motivated by religious belief, including expression of that belief, the Founding Fathers apparently intended the protection to be less than absolute. Here the burden on religious freedom from restricting a religiously motivated act would be weighed against the negative effect allowing such an act would have on society. The intended standard for determining when a restriction on a religious action would be allowed and when not, however, is admittedly uncertain.

This distinction between the protection afforded belief and action can be seen in Virginia's Bill for Establishing Religious Freedom, enacted just before the writing of the Constitution. The bill had been drafted by Thomas Jefferson, and the battle for its enactment was led by James Madison. Presumably, they would not have gone to such pains to obtain passage of a bill which they thought should be unconstitutional. The bill can therefore be taken as a good indication of what they and others at the time thought was allowable under the Free Exercise Clause.

The bill provided absolute protection for religious opinions, stating that:

> . . . no man . . . shall be enforced, restrained, molested, or burdened in his body or goods, nor shall otherwise suffer, *on account of his religious opinions or belief*; but that all men shall be free to profess, and by argument maintain, their *opinion* in matters of religion, and that the same shall in no way diminish, enlarge, or affect their civil capacities.[43] (emphasis added)

The bill, however, provided no explicit protection for religiously motivated actions, stating only in the preface, "it is time enough for the rightful purpose of civil government for its officers to interfere when principles break out into overt acts against peace and good order."[44] This suggested that religious actions could be restricted, and the standard for determining when was whether the act went against "peace and good order."

In the debate over the Free Exercise Clause enacted in the Virginia constitution in 1776, George Mason had suggested that the language of the provision include the standard that religious actions could be restricted only when "under color of religion any man disturb the peace, happiness, or safety of society . . . ."[45] Under the standard proposed by James Madison, religious actions could be restricted only when "under color of religion the preservation of equal liberty, and the existence of the State be manifestly endangered."[46] But the final provision included no explicit standard, stating only that it protected "the free exercise of religion," as quoted above.[47]

John Locke, whose writings generally served as the philosophical foundation for the Founding Fathers, held that a restriction could not be imposed on religious action because of the belief behind it. But a general restriction applying to actions regardless of whether they were religious or secular would always be valid as to the religious actions as well as the others.[48]

Early Federal Actions

Actions and statements by Congress, the Presidents, and eminent jurists soon after passage of the First Amendment confirm the description of the original intent of the framers provided above. These actions and statements, moreover, are inconsistent with the currently prevailing interpretations of at least the Establishment Clause, particularly the notion that this clause bans all aid or benefit to religion from government actions or programs, or mandates a complete separation of church and state.

One of the earliest actions which must be mentioned, however, occurred at the state level. Ratification of the First Amendment in Virginia was delayed for more than 2 years by eight state senators who objected to the Establishment Clause because:

> . . . although it goes to restrain Congress from passing laws establishing any national religion, they might, notwithstanding, levy taxes to any amount for the support of religion or its preachers, . . .[49]

Apparently, these senators gave the same meaning to the notion of establishment, and the clause federally prohibiting it, as described above—no preference for one or more sects or religions. But Congress could still provide aid to religion on a nonpreferential basis.

The Congress that passed the First Amendment apparently had the same view. One of its very first acts was to establish a chaplain system to serve the Congress. A House Committee with Madison as a member first proposed it. Since that time, government funds have been used for the support of ministers serving the Congress.[50]

The First Congress also authorized the President to appoint a chaplain for the military. The Second Congress provided for a separate chaplain system for the Army, with the Third Congress providing one for the Navy.[51] Later, Congress approved regulations for the Military and Naval Academies requiring enrollees to attend services every Sunday at the denomination of their choice, and prayer was required in the mess hall before breakfast each day.[52]

On the very day after the House in the First Congress adopted the final version of the First Amendment proposed by the Conference Committee, it adopted the following resolution:

> That a joint committee of both Houses be directed to wait upon the President of the United States, to request that he would recommend to the people of the United States a day of public Thanksgiving and prayer, to be observed by acknowledging with grateful hearts, the many signal favors of Almighty God especially by affording them an opportunity to establish a Constitution of government for their safety and happiness.[53]

Washington complied, issuing a proclamation which said in part:

> Whereas it is the duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor . . .
>
> . . . Now, therefore, I do recommend and assign Thursday, the 26th day of November next, to be devoted by people of these states to the service of that great and generous Being who is the beneficient author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for his kind care and

> protection of the people of this country previous to their becoming a nation; . . .[54]

Washington issued another such proclamation of Thanksgiving, and this early tradition was followed by President John Adams, who issued two such proclamations, and President Madison, intimately involved with the passage of the First Amendment, who issued four.[55] President Jefferson, however, refused to issue such proclamations, believing that they would tend to have a coercive, mandatory effect through the operation of public opinion and besides, as a very strong advocate of Federalism, thought in any event that such matters should be left to the states.[56]

But the most important early Federal action supporting the above described original intent of the framers was the hundred year long policy, begun by the very first President and Congress, of providing funds for religious proselytization and education among the Indians. The development of this policy began on August 7, 1789, a week before the major House debate on the religion clauses, when President Washington sent to Congress a report from his Secretary of War Henry Knox recommending that Congress fund missionaries to be sent to work among the Indians. Later in the month, Knox, under orders from Washington, instructed the Commissioner for Trading with the Indians to open communications with Indian groups for the acceptance of resident missionaries on their homelands, saying:

> The object of this establishment would be the happiness of the Indians teaching them the great duties of religion and morality, and to inculcate a friendship and attachment to the United States.[57]

Congress eventually approved Washington's proposal.[58]

In 1795, Washington concluded a treaty with the Oneida, Tuscorora and Stockbridge Indians, which provided for payment by the United States of $1000 for the building of a church on the Indians' homeland.[59]

On October 17, 1803, President Jefferson proposed to the Senate a treaty with the Kaskaskia Indians, under which they ceded their tribal lands to the United States, in return for, among other considerations, Federal government financing of a Catholic priest for the Indians, and the building of a Catholic Church. The treaty said:

> And whereas, the greater part of the said tribe have been baptized and received into the Catholic Church to which they are much attached, the United States will give annually for seven years one hundred dollars towards the support of a priest of that religion, who will engage to perform for the said tribe the duties of his office, and also to instruct as

> many of their children as possible in the rudiments of literature. And the United States will further give the sum of three hundred dollars to assist the said tribe in the erection of the church.[60]

The Senate approved the treaty, and Congress appropriated the required funds.[61]

Similarly, in 1796 Congress granted 4,000 acres around each of three Indian towns to "the Society of the United Brethren for Propagating the Gospel Among the Heathen" in trust for the Indians, to the extent they developed and used the land to spread religion among the Indians. Congress extended the deadline for development of the land several times over the next decade, until 1805, when the opportunity to gain control over any remaining areas within the original grant ceased.[62]

President James Monroe concluded a treaty with the Wyandot Indians under which the United States agreed to donate 640 nearby acres to the Catholic Church, because of the attachment of the Indians to Catholicism.[63] President John Quincy Adams followed with a treaty with the Osage providing for a missionary establishment on their land.[64] President Andrew Jackson concluded a treaty with the Kickapoo Indians that included funds for the building of a church on the Indians' land.[65] President Martin Van Buren negotiated a treaty with the Oneida Indians providing funds for the building of a church and a parsonage for the tribe.[66]

The practice of providing Federal money to religious groups for the advancement of religion among the Indians continued until 1896, when Congress appropriated $500,000 for this purpose in that year.[67] In 1897, Congress began phasing the program out.[68]

The expressed purpose of Congress in providing these funds was in effect to conquer the Indians by civilization—if the Indians became Christians, they would likely drop violent resistance to the advance westward of the white man. Presumably, such funding was open to any religious sect that sought it for an available group of Indians. This would make the program consistent with the original "no preference" intent behind the Establishment Clause. But this policy is certainly not consistent with a theory that religious groups can receive no aid or benefit from government actions.

The Supreme Court did not have an opportunity to rule on the Establishment Clause during the early years of the republic. But venerated Constitutional historian and Supreme Court Justice Joseph Story, an appointee of James Madison who served on the court from 1811 to 1845, had this to say about the intent behind the Establishment Clause in his highly authoritative *Commentaries on the Constitution* published in 1833:

> Probably at the time of the adoption of the Constitution, and of the Amendment to it now under consideration, the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.[69]

Story also said:

> The real object of the Amendment was . . . to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government . . .[70]

Story continued:

> . . . it is impossible for those who believe in the truth of Christianity as a divine revelation to doubt that it is the especial duty of government to foster and encourage it among all the citizens and subjects.[71]

Another early and eminent constitutional historian was Thomas Cooley, some of whose comments we have already noted. In his highly authoritative *Constitutional Limitations*, published in 1868, Cooley states:

> But while thus careful to establish religious freedom and equality, the American Constitution contains no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires,. . . No principle of Constitutional law is violated when Thanksgiving or fast days are appointed; when chaplains are designated for the Army and Navy; and when legislative sessions are opened with prayer or the reading of the Scripture, or when religious teaching is encouraged by exempting houses of religious worship from the taxation for the support of state government. Undoubtedly the spirit of the Constitution will require, in all these cases, that care be taken to avoid discrimination in favor of any one denomination or sect; but the power to do any of these things will not be unconstitutional, simply because of being suspectible to abuse . . .[72]

Clearly, these towering constitutional authorities did not see the Establishment Clause as banning all aid or benefit to religion from government actions, or as mandating complete separation of church and state. They saw the content as stated above—to ban preferential treatment for any one religious sect, or group of sects (if we take Story's emphasis on Christianity to mean religion in general, there being so relatively few adherents to other religions in the U.S. at that time). The government could even affirmatively undertake to aid religion, as long as it did so on a nonpreferential basis.

The first Supreme Court case to rule on an Establishment Clause issue did not occur until 1899. In *Bradfield v. Reynolds*[73] Congress had provided money for the construction of an additional ward at Providence Hospital in the District of Columbia. The Court rejected the claim of plaintiff Roberts that this grant of funds violated the Establishment Clause because the hospital was owned and operated by a monastic order of the Roman Catholic Church—the Sisters of Charity. Congress had granted the funds on the same nonpreferential basis that it would to any secular hospital operator. The mere fact that the funds provided aid to a religious organization did not mean that the action violated the Establishment Clause.

Madison and Jefferson

Despite the overwhelming evidence cited above, certain actions and statements of Madison and Jefferson are often cited as support for the view that the Establishment Clause was intended to ban all government aid or benefit to religion, mandating an absolute separation of church and state.

The most important of these relates to the campaign to disestablish the Anglican Church in Virginia.[74] In 1779, Jefferson introduced a "Bill for Establishing Religious Freedom," which would have ended all preferential treatment for the Anglican Church, and allowed complete religious toleration for all sects. Though the Revolution had brought the established Anglican Church into public disfavor because of its role as the Church of England, there was not enough support to pass Jefferson's bill. Legislative action was taken, however, to weaken the favoritism for the Anglican Church. In 1784, after the Revolutionary War had ended, a "Bill for Establishing Support for Teachers of the Christian Religion" was introduced by Jefferson's opponents, which would have made Christianity the established religion of Virginia, requiring, among other things, that each person pay a certain amount for the support of the Christian sect of his choice.

Madison led the fight against this latter bill, publishing his famed "Memorial and Remonstrance Against Religious Establishments" in opposition to the bill. This led the turn in public opinion in favor of Madison and Jefferson, and the proposed bill was defeated in 1785. Madison then promptly reintroduced Jefferson's bill, which was passed in that same year, taking effect in 1786.

There are many reasons why this experience does not contradict the no-preference original intent behind the Establishment Clause described above in favor of the harsher no-aid doctrine. First, it cannot be assumed that what Jefferson and Madison supported as good law in their state they wanted to make constitutionally binding on the whole country. Jefferson in particular, but also Madison, were strong, uncompromising supporters of states' rights, and believed that these issues should be decided by the states.

Secondly, Jefferson was in France at the time of the adoption of the First Amendment, and Madison was only one actor in that adoption. It is the views of the whole nation at that time, not just Madison's, which determine the original intent behind the Establishment Clause. Madison had to accommodate these views to achieve nationwide acceptance of the clause, including the support of Puritan New England. Madison's public statements and actions as to the meaning of the amendment itself at the time of passage, as cited above, are relevant to its meaning, indicating any such accommodations made, not what happened years earlier in regard to a state legislative struggle.

But, most importantly, the statements and actions of Jefferson and Madison at the time of this Virginia legislative struggle completely support the earlier conclusion that they and everyone else viewed an establishment of religion as providing preferential treatment. Preference is what they objected to in Virginia, and a no-preference policy is what they meant to pass into law in that state, rather than the no-aid doctrine or some absolute separation of church and state.

Thus, the 1784 bill against which Madison led the fight would have established one religion, Christianity, as the official religion of the state, with assorted legal preferences. It was this establishment and preference to which Madison mainly objected in his "Memorial and Remonstrance." In a famous passage, he stated:

> . . . who does not see that the same authority which can establish Christianity, in exclusion of all other religions, may establish with the same ease any particular sect of Christians, in exclusion of all other sects. That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment.[75]

This passage does not mean that the government cannot spend three pence redounding to the aid of religion, as it has often been incredibly cited to mean by otherwise literate men. Rather, it means that if the establishment of Christianity is acceptable in principle to the exclusion of all other religions, then there can be no principled objection to the establishment of any one Christian sect, with accompanying unjust preferences.

Jefferson's bill, which was enacted with Madison's support, analytically contained four elements: (1) no man shall be compelled by the government to attend or support any religious worship, place, or ministry whatsoever; (2) nor be punished or interfered with by the government on account of his religious opinions or beliefs; (3) nor be restrained from professing or arguing for his religious opinions or beliefs; (4) nor be legally discriminated against for such activities.[76] The bill therefore does no more than remove all vestiges of establishment and preferential treatment for any religion. It does not ban all aid or benefit to religion from government acts or impose an absolute separation of church and state.

This is made abundantly clear by the fact that the first state action in Virginia to forbid sectarian instruction in the public schools did not take place until 1847, and the first act forbidding the use of public funds in denominational schools was not passed until 1902.[77] When the Supreme Court in the *McCollum* case in 1948, discussed in the next chapter, struck down a "released time" public school policy in Illinois, citing the Virginia 1786 Religious Freedom bill in interpretation of the Establishment Clause, the exact same policy was still in force in Virginia.[78]

Another misconstrued piece of history is a letter Jefferson sent as President in reply to a letter of congratulations from an association of Baptists in Danbury, Connecticut. Jefferson wrote:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinion, I contemplate with solemn reverence that act of the whole American People which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and state.[79]

The concluding phrase in this sentence has been seized upon by strict no aid theorists as strong authority for the doctrine of complete separation of church and state. But this phrase, standing on its own or in the context of the rest of the letter, espouses a mere metaphor too vague to support any theory of the Establishment Clause. It has no clear meaning distinguishing between no-aid and no-preference theories. It is also not in the Constitution.

Another celebrated item is known as Madison's "Detached Memoranda." In 1946, one hundred years after Madison died, a rough draft apparently authored by him with this title was uncovered in the estate of a William C. Rives. In it, he condemns both the Congressional chaplain system and proclamations of Thanksgiving as unconstitutional violations of the Establishment Clause. But he condemns the chaplain system on the grounds that in practice it has not been nonpreferential between religious sects—only chaplains of the creed preferred by the majority had been hired. Presidential proclamations of Thanksgiving and prayer he found to have coercive qualities, through the pressure of public opinion, rather than being merely advisory.[80] These grounds for condemning these practices are based on a no-preference theory of the Establishment Clause, and therefore provide no support for the strict no-aid theory. Moreover, the views stated in the "Detached Memoranda" are contrary to Madison's statements and actions while he was in public life, and these are far more relevant to the original meaning of the Establishment Clause. Madison, remember, was a member of the Congressional Committee that recommended the chaplain system, and he maintained the system and issued proclamations of days of Thanksgiving and prayer while President. In any event, the uncontroversial pursuit of both these policies in the early years of the republic shows that even if Madison decided they were unconstitutional during his retirement, the great majority of those alive at the time of the adoption of the First Amendment disagreed with him, and it is the intent of the country as a whole at the time of adoption that is relevant to the meaning of the amendment.

As President, Madison did veto a bill incorporating an Episcopal Church in Alexandria in the District of Columbia, on the grounds that it violated the Establishment Clause. The next week he vetoed a bill granting U.S. lands in Mississippi to a Protestant Church on the same grounds, saying that it would provide "a principle and precedent for the appropriation of funds of the United States for the use and support of religious societies."[81] But both these bills can be seen as providing preferential aid to the particular churches involved, if not viewed in the context of a long-term policy providing the same benefits to all on a nonpreferential basis. True, the quoted phrase from the second veto message suggests that Congress cannot appropriate funds for the purpose of supporting religious societies, regardless of whether this is done on a nonpreferential basis. This phrase is the only historical item truly inconsistent with the original intent described above. But even this does not ban nonpreferential aid or benefit to religion resulting from government actions undertaken for secular purposes, and therefore it does not support a strict no-aid theory either. In any event, this stray phrase cannot serve as a foundation for a constitutional doctrine, particularly in contrast to the remarkable amount of contrary evidence cited in this chapter.

Jefferson and Madison knew that "establishment" meant providing preferential treatment for one or more religions, and this is what they thought was prohibited by the Establishment Clause. Throughout their lives, they both consistently used the word establishment to mean precisely this. During the Congressional debates on the First Amendment, as noted above, Madison forcefully and effectively took the position that the word "establishment" would clearly convey the no-preference intent behind the amendment. Jefferson's overriding concern with preferential treatment was indicated when he wrote, "I am for freedom of religion, and against all maneuvers to bring about a legal ascendency of one sect over another."[82] Similarly, Madison wrote that the United States has "the noble merit of first unshackling conscience from persecuting laws, and of establishing among sects a religious equality."[83] The actions of both men in public life, particularly when serving as President, further confirm this view.

Indeed, Jefferson's own conception of the wall of separation between church and state did not prevent him from advocating and implementing government support for religious education in the state of Virginia. After he retired as President, Jefferson wrote a bill for Virginia providing for the creation of public elementary schools, which the state passed in 1817. The bill provided that "no religious reading, instruction or exercise, shall be prescribed or practiced *inconsistent with the tenets of any religious sect or denomination* (emphasis added)."[84] This law still allowed nondenominational religious activities.

Thus, Jefferson did not find religious activities in the public schools to imply an establishment of religion, which his own bill banned in Virginia in 1786, as long as, once again, these activities did not involve any preferential treatment for any sect. The implicit government aid to religion from allowing these activites to take place in publicly financed schools did not invalidate the practice in Jefferson's mind.

In 1814, Jefferson had recommended that the state create a publicly financed professional school of theology to train clergymen.[85] Later, however, when he founded the publicly owned and operated University of Virginia, a department or school of theology was not created because in his own words he could not find a practical way to do so without in effect preferring some sects over others. Jefferson wrote:

> In conformity with the principles of our Constitution, which place all sects of religion on an equal footing, with the jealousies of the different sects in guarding that equality from encroachment and surprise . . . we have thought it proper at this point to leave every sect, as they think fittest, the means of further instruction in their own peculiar tenets.[86]

This once again supports the view that it was preferential treatment, rather than aid or benefit to religion, that was the key factor in Jefferson's view of establishment.

To further confirm this, Jefferson later adopted a system of religious education for his public university. Noting again his original concern of "giving countenance or ascendency of one sect over another," Jefferson later wrote:

> It was not, however, to be understood that instruction in religious opinion and duties was meant to be precluded by the public authorities, as indifferent to the interests of society. On the contrary, the relations which exist between man and his Maker, and the duties resulting from these relations, are the most interesting and important to every human being, and the most incumbent on his study and investigation.[87]

To resolve the equality problem, but provide for the religious education Jefferson thought necessary, he invited all sects that wanted to establish their own schools of religious instruction on the University campus, "so near as that their students may attend the lectures there, and have the free use of our library, and every other accommodation we can give them . . . ."[88] Jefferson then issued school regulations providing that:

> . . . the students of the University will be free and expected to attend religious worship at the establishment of their respected sects, in the morning, and in time to meet their school in the University at the stated hour. The students of such religious school, if they attend school at the University, shall be considered students of the University, subject to the same regulations, and entitled to the same rights and privileges.[89]

Clearly, nonpreferential aid to religion did not involve an establishment in Jefferson's view. In truth, Jefferson, Madison, and the other Founding Fathers, right or wrong, actually thought such aid was necessary to the maintenance of the new nation, and a free society.[90] Distinguished constitutional historian Walter Berns notes that Jefferson argued that a firmly established religious belief among the common people was the only way to maintain their respect for the rights and liberties of other men over the long run.[91] "And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God?" Jefferson asked.[92] He actually wrote this in a discussion of slavery, arguing that its injustice could only be made popularly manifest through the spread of religion. No less a chronicler of early America than Alexis De Tocqueville noted the prevalence of this view of the importance of religion, writing:

> I do not know whether all Americans have a sincere faith in their religion—for who can search the human heart?—but I am certain that they hold it to be indispensable to the maintenance of republican institutions. This opinion is not peculiar to a class of citizens or to a party, but it belongs to the whole nation and to every rank of society.[93]

Washington expressed these views in his Farewell Address:

> Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens . . . and let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.[94]

Berns summarized the views of the Founding Fathers:

> Wisdom might dictate that it be the policy of the government to promote this conviction, which it can do by supporting religion in the form of a "multiplicity of sects while favoring no particular one of them." Pennsylvania and New York, Jefferson had pointed out . . ., had shown the way for Virginia (and the United States as a whole). They had "long subsisted without any establishments," but religion was well supported there—" of various kinds indeed, but all good enough" from his political point of view, "all sufficient to preserve peace and order [and] morals." Harvey C. Mansfield, Jr. has stated the conclusion to be drawn from this: "For the sake of liberty, government must support religion in general, but no particular religion."[95]

The Fourteenth Amendment

Though the religion clauses by their very terms applied only at the Federal level (*Congress* shall make no law . . .), and this was the clear intent of the framers as described above, the courts today regularly apply them to the states as well, thereby providing the basis for federal judicial interference in local education policies relating to religion. The justification for this application to the states is the Fourteenth Amendment, passed in 1868.

The relevant words of the Fourteenth Amendment state, "... nor shall any state deprive any person of life, liberty, or property, without due process of law." The Supreme Court has held that this "Due-Process Clause" makes most of the Bill of Rights applicable against the state governments. Any state law affecting the life, liberty, or property of any person must comply with these constitutional provisions or it is not consistent with due process of law. This is known as the incorporation doctrine.

The Supreme Court began using the Fourteenth Amendment in this way in 1925,[96] progressively incorporating more and more of the Bill of Rights against the states. The Free Exercise Clause was held applicable to the states in 1940[97] and the Establishment Clause in 1948[98] (not counting the dicta in the 1947 Everson case). This use of the amendment, and the incorporation doctrine in general, is highly controversial, and rightly so. For much persuasive, scholarly work has shown that the framers of the amendment had no such intention.[99] But there are some special reasons as to why they certainly did not intend to so incorporate the Establishment Clause against the states.

Perhaps the clearest of these is that Congress considered and rejected eleven times between 1870 and 1888[100] and 25 times between 1870 and 1950[101] proposed Constitutional amendments that would have applied the Establishment Clause in some form against the states. This clearly shows that Congress, especially the very same people who passed the Fourteenth Amendment, did not believe that that amendment already applied the Establishment Clause to the states. It also clearly shows that the American people do not want such a provision in the Constitution.

The most illustrative example of these proposals and rejections occurred in 1875.[102] James G. Blaine, Former House Speaker and future Republican Presidential candidate, introduced the amendment with the active support of President Grant and the Republican Party. The amendment not only included the phrase, "No State shall make any law respecting an establishment of religion," but also provided:

> No public property, and no public revenues of ... *the United States,* or any State, Territory, District or Municipal Corporation, shall be appropriated to, or made or used for, the support of any school, educational or other institution, under the control of any religious or anti-religious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or anti-religious sect, organization, or denomination shall be taught ...[103] (emphasis added)

The inclusion of the Federal government in this proposed amendment indicates clearly that at this time as well no one in Congress thought that the Federal prohibition on establishment banned nonpreferential federal government aid to religious education.

The Congress that considered this amendment included 23 members of the Congress that passed the Fourteenth Amendment, yet:

> Not one of the several Representatives and Senators who spoke on the proposal even suggested that its provisions were implicit in the amendment ratified just seven years earlier . . . Senator Stevenson, in opposing the proposed amendment, referred to Thomas Jefferson: "Friend as he was of religious freedom, he would never have contended that the states . . . should be degraded and that the Government of the United States, a government of limited authority, a mere agent of the states with prescribed powers, should undertake to take possession of these schools, and of their religion." Remarks of [other members of Congress] . . . gave confirmation to the belief that none of the legislators in 1875 thought the Fourteenth Amendment incorporated the religious provisions of the First.[104]

Blaine's amendment did better than any of the other proposals—it passed the House, but failed in the Senate. Interestingly, the motivation for this and similar amendments seemed to be anti-Catholic sentiment, in reaction to the waves of Catholic immigrants at that time and their establishment of a private parochial school system, rather than high-minded church and state philosophy.

The second special reason as to why the Fourteenth Amendment did not incorporate the Establishment Clause relates to the intent behind the original First Amendment. The Founding Fathers didn't apply the Establishment Clause only to the Federal level because they didn't think of the states. They affirmatively wanted to reserve establishment concerns to the states. In fact, the wording of the First Amendment provides a constitutional guarantee to the states that this will be so. As we have seen, by providing that Congress shall make no law "respecting" an establishment, the clause prohibits Congress from interfering with state establishments, as well as from creating its own. With five state establishments of religion existing at the time of the amendment's adoption, this guarantee was probably politically necessary.

This raises an important logical problem as to how the Establishment Clause could be incorporated against the states. The clause guarantees the states that their laws relating to establishments will not be interfered with. How does one incorporate a right of the states against the states? If "the states" is substituted for "Congress" in the language of the Establishment Clause, then one is not merely applying it to the states, but radically changing it to remove a constitutional guarantee originally intended. This cannot be justified on the basis of the Fourteenth Amendment.

The third special argument against incorporating the Establishment Clause against the states is based on the Supreme Court's own theory of incorporation. In order for the due process clause to apply in a case, allowing some Bill of Rights provision to be applied to the states, the state law or action must first deprive one of "life, liberty or property." The Establishment Clause cases the courts have considered since World War II have not involved a deprivation of life or property. The element the courts have based their decisions on has been deprivation of liberty. But most of the cases have not involved this element either. Allowing high school students to form "Students for Voluntary Prayer" on the same basis as other clubs, allowing them to read the Bible and pray on the lawn before class, tuition tax credit or voucher systems—all involve no coercion or deprivation of liberty.[105]

Under the Supreme Court's own theory, only state establishment laws or policies which involve a deprivation of liberty could be considered covered under the First Amendment through the Due Process Clause. The courts would have to look for the key element of coercion before they could apply the Establishment Clause to the states. But mere aid or benefit to religion resulting from a general secular government program, or merely allowing the religiously motivated to participate on the same basis as everyone else, would generally not involve any such deprivation of liberty. The courts therefore have no business applying the Establishment Clause to the states in such cases, under their own theory of incorporation.

Considering the earlier comments above, however, it appears that the framers of the Fourteenth Amendment never intended that it would in effect apply the First Amendment's Establishment Clause to the states in any form.

Conclusion

Based on the historical evidence in this chapter, the following three conclusions can be drawn as to the original intent of the framers concerning the religion clauses:

(1) The Establishment Clause was intended to prohibit Federal laws providing preferential treatment for one or more religious sects. It was also intended to prohibit the Federal government from interfering with state establishments, or state laws providing preferential treatment for one or more sects. It was not intended to provide for an "absolute separation of church and state" or to ban all aid or benefit to religion from

government actions. Congress could even undertake to aid religion if done on a nonpreferential basis. The restrictions of the Establishment Clause were intended to apply at the Federal level only and not to the states. In fact, the clause provided a constitutional guarantee to the states that they would be free to adopt whatever policies they democratically chose in this area.

(2) The framers of the Fourteenth Amendment did not intend it to apply the Establishment Clause to the states. Indeed, the clause cannot be so applied without obliterating the original First Amendment guarantee to the states that they would be free to adopt their own policies in this area without Federal interference.

(3) The Free Exercise Clause was intended to provide absolute freedom for religious opinions. It was also intended to provide protection for religiously motivated action, but the right to engage in any such acts would be weighed against the harm they might cause to society. Laws restricting such acts would be allowed if the harm they prevented outweighed the interest in religious liberty. Freedom for actions, therefore, as opposed to opinions, was not intended to be absolute.

These conclusions are not unique to this author. The compelling historical evidence concerning the first two was marshalled in *Religion and Education Under the Constitution*, a devastating critique of the Supreme Court by Professor James O'Neill published almost 35 years ago.[106] At about the same time, authoritative constitutional historian and Princeton Professor Edward S. Corwin similarly skewered the Court in a shorter article.[107] Professors Joseph H. Brady[108] and James McClellan[109] followed with works further elaborating these themes. Professors Walter Berns[110] Michael Malbin[111] and Robert L. Cord[112] have most recently and brilliantly demonstrated the original intent behind the Establishment Clause. There have been many others.[113]

But the Supreme Court has been openly scornful of this rising chorus of dissenting scholars. In 1963, in the leading case firmly striking down Bible reading and prayer in the public schools, Justice Clark, speaking for the majority, explained that though the Establishment Clause interpretations of the Court had by then:

> . . . been long established, recognized and consistently reaffirmed, others continue to question their history, logic and efficacy. Such contentions, in light of the consistent interpretation in cases of this Court, seem entirely untenable and of value only as academic exercises.[114]

In the same case, Justice Brennan said, "A too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected . . ."[115] In the 1948 *McCollum* case, Justice Jackson said that there was no law in this area to guide the members of the Court, "but our own prepossessions."[116]

The Justices are, of course, bound by their oaths of office to uphold the Constitution as written by the framers, not to impose their own quixotic public policy values on the rest of us. But this judicial duty is now considered blasé by the legal profession, and it appears unlikely that the Court will return to the original intent of the framers as described above in the forseeable future.

This has been recently illustrated in a case in Alabama, where a remarkably courageous Federal Judge refused to ban prayer in the local Mobile schools. Judge W. B. Hand held on January 14, 1983, that the Supreme Court precedents in this area were contrary to the binding, original intent of the framers, reviewing the historical evidence as discussed above.[117] An outraged Justice Powell reached all the way down from the Supreme Court to ban the local school prayer by a stay pending appeal, saying that the practice was clearly unconstitutional under the precedents of the Supreme Court.[118] On appeal, the Circuit Court did not offer any counterarguments to the historical evidence marshalled by Judge Hand. The court simply stated, "The Supreme Court, however, has carefully considered these arguments and rejected them."[119] The appeals court therefore reversed the lower court and permanently banned prayer in the Alabama schools.

This does not mean that the struggle for the judicial readoption of the original intent should be stopped. In our constitutional republic, this is ultimately the only acceptable permanent resolution of these issues, and there are many possible avenues for achieving this goal. But in the meantime, the courts might at least be persuaded to adopt views not hostile to the religious.

Chapter 2 Footnotes

[1] The European history discussed below is taken primarily from Will and Ariel Durant, *The Story of Civilization* (New York: Simon and Schuster, 1957).

[2] Will Durant, *The Story of Civilization*, Vol. VI, p. 572

[3] The American history discussed in this section of this chapter is taken primarily from Samuel Eliot Morison, *Th Oxford History of the American People* (New York: Oxford University Press, 1965).

[4] Joseph H. Brady, *Confusion Twice Confounded: The First Amendment and the Supreme Court* (South Orange, N.J.: Seton Hall University Press, 1954), pp. 5-6.

[5] Ibid.

[6] James B. McClellan, "The Making and Unmaking of the Establishment Clause," in Patrick B. McGuigan, Randall R. Rader, eds., *A Blueprint for Judi-*

cial Reform (Washington. D.C.: Free Congress Foundation, 1981), pp. 306-308.

[7] Robert L. Cord, *Separation of Church and State, Historical Fact and Current Fiction* (New York: Lambeth Press, 1982), p. 7.

[8] Michael J. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (Washington, D.C.: American Enterprise Institute, 1978), pp. 4-5.

[9] J. M. O'Neill, *Religion and Education Under the Constitution* (New York: Harper, 1949), p. 113.

[10] Brady, *Confusion Twice Confounded*, p. 12.

[11] Ibid., pp. 14-15; O'Neill, *Religion and Education*, pp. 91-95.

[12] *Annals of Congress*, Vol. I, p. 434.

[13] Brady, *Confusion Twice Confounded*, p. 13

[14] *Annals of Congress*, Vol. I., p. 729.

[15] The concern was raised in particular by Peter Sylvester of New York and Elbridge Gerry of Massachusetts, *Annals of Congress*, Vol. i, pp. 729-730.

[16] *Annals of Congress*, Vol. I, p. 730.

[17] Malbin, *Religion and Politics*, p. 8.

[18] *Annals of Congress*, Vol. I, p. 731.

[19] Ibid., p. 730.

[20] Benjamin Huntington of Connecticut first raised this concern in a much misunderstood and misquoted passage. He said that he agreed that the amendment meant what Madison said it meant, but he feared that it may be susceptible to distortion by others in a way that would harm the state establishments. As an example, he noted that the established church in Connecticut was maintained by an assessment against its members, and he suggested that these assessments might not be enforcible in the Federal Courts because of the proposed Establishment Clause. See *Annals of Congress*, Vol, I, p. 730. In response, Madison suggested that the word national could be inserted into the amendment in front of religion to show that it was only a federally imposed establishment that was forbidden. Ibid., p. 731.

[21] See e.g., Malbin, *Religion and Politics*, pp. 9-12.

[22] *Annals of Congress*, Vol. I, p. 731.

[23] Malbin, *Religion and Politics*, pp. 10-11.

[24] *Annals of Congress*, Vol. I, p. 766.

[25] *Journals of the First Session of the Senate*, p. 70.

[26] Ibid.

[27] Ibid.

[28] Ibid.

[29] Ibid., p. 77.

[30] Malbin, *Religion and Politics*, pp. 13-14.

[31] This view is supported by the exceptional analysis of Malbin. Ibid., pp. 15-16.

[32] Brady, *Confusion Twice Confounded*, pp. 6-8.

[33] Ibid., pp. 6-7.

[34] Ibid., p. 7.

[35] Ibid., pp. 7-8.

[36] Ibid., p. 8.

[37] Ibid., p. 8.

[38] Malbin, *Religion and Politics*, pp. 19-37.

[39] John Locke, *A Letter Concerning Toleration*, (Indianapolis: Bobbs-Merrill, 1975).

[40] Malbin, *Religion and Politics*, p. 22. Since only opinions concerning the manner of discharging religious duty cannot be directed by force and violence, it appears that the phrase, "and the manner of discharging it," should be taken to refer to opinions in this regard.

[41] Malbin, p. 33.

[42] Ibid., p. 34.

[43] Ibid., p. 27-28.

[44] Ibid., p. 27.

[45] Ibid., p. 21.

[46] Ibid., p. 21-22.

[47] Ibid., p. 22.

[48] Ibid., pp. 30-31.

[49] Brady, *Confusion Twice Confounded*, p. 28.

[50] See Cord, *Separation of Church and State*, pp. 23, 153-154.

[51] Ibid., p. 54; O'Neill, *Religion and Education*, p. 111.

[52] Brady, *Confusion Twice Confounded*, pp. 32-33.

[53] O'Neill, *Religion and Education*, p.110, Cord, *Separation of Church and State*, p. 27.

[54] Cord, *Separation of Church and State*, pp. 51-52.

[55] Ibid., p. 53.

[56] Ibid., p. 40.

[57] O'Neill, *Religion and Education*, p. 116.

[58] Ibid., pp. 115-116.

[59] Cord, *Separation of Church and State*, p. 58.

[60] Ibid., p. 38.

[61] Ibid., pp. 38-39.

[62] Ibid., pp. 42-45.

[63] Ibid., p. 59.

[64] Ibid.

[65] Ibid.

[66] Ibid., pp. 59-60.

[67] O'Neill, *Religion and Education*, pp. 118-119.

[68] Ibid.

[69] Brady, *Confusion Twice Confounded*, p. 46.

[70] Ibid., p. 45.

[71] Ibid., p. 46.

[72] Thomas M. Cooley, *Constitutional Limitations*, (Boston: Little, Brown & Co., 1868), pp. 470-471.

[73] 175 US 291 (1899).

[74] See Brady, *Confusion Twice Confounded*, pp. 54-59; Malbin, *Religion and Politics*, pp. 22-28.

[75] Saul K. Padover, *The Complete Madison*, (New York: Harper & Brothers, 1953), p. 301.

[76] O'Neill, *Religion and Education*, p. 74.

[77] Ibid., p. 146.

[78] Ibid., p. 147.

[79] Saul K. Padover, *The Complete Jefferson*, (Freeport, N.Y.: Books for Libraries Press, 1943), pp. 518-19.

[80] See Elizabeth Fleet, ed., "Madison's Detached Memoranda," *William and Mary Quarterly*, Vol. III (1946), pp. 535-66.

[81] Brady, *Confusion Twice Confounded*, p. 23.

[82] O'Neill, *Religion and Education*, p. 85.

[83] Ibid., p. 97.

[84] Brady, *Confusion Twice Confounded*, pp. 61-62.

[85] Ibid., p. 61.

[86] Ibid., p. 63.

[87] Ibid., pp. 63-64.

[88] Ibid., p. 65.

[89] Ibid., p. 66.

[90] Walter Berns, *The First Amendment and the Future of American Democracy*, (New York: Basic Books, 1976), Chapter 1.

[91] Ibid., pp. 13-14.

[92] Ibid.

[93] Ibid., p. 12.

[94] Ibid., p. 13.

[95] Ibid., p. 14.

[96] *New York v. Gitlow*, 268 US 652 (1925).

[97] *Cantwell v. Connecticut*, 320 US 296 (1940).

[98] *McCollum v. Board of Education of Champaign, Illinois*, 333 US 203 (1948).

[99] The most famous of these are Charles L. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?* 2 Stan L. Rev. 5 (1949); Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment*. (Cambridge, Mass.: Harvard University Press, 1977).

[100] O'Neill, *Religion and Education*, p. 123.

[101] Brady, *Confusion Twice Confounded*, p. 35.

[102] See, Ibid., pp. 36-38.

[103] Ibid., p. 37.

[104] McClellan, in *A Blueprint for Judicial Reform*, p. 318.

[105] See cases discussed in Chapter 1, pp. 1-6, and Chapter 3.

[106] O'Neill, *Religion and Education*.

[107] Edward S. Corwin, "The Supreme Court as National School Board," *Law and Contemporary Problems*, Vol. 14, p. 3 (1949).

[108] Brady, *Confusion Twice Confounded*.

[109] McClellan, in *A Blueprint for Judicial Reform*.

[110] Berns, *The First Amendment*.

[111] Malbin, *Religion in Politics*.

[112] Cord, *Separation of Church and State*.

[113] Other works supporting the view expressed here in regard to the Establishment Clause are Mark DeWolfe Howe, *The Garden and the Wilderness*, (Chicago: Univesity of Chicago Press, 1965); C. J. Antieau, A. T. Downey, and E. G. Roberts, *Freedom From Federal Establishment: Formation and History of the First Amendment Religion Clauses*, (Milwaukee: Bruce, 1964); Charles E. Rice, *The Supreme Court and Public Prayer*, (New York: Fordham, 1964); Francis O'Brien, *Justice Need and the First Amendment*, (Washington, D.C.: Georgetown University Press, 1965). For additional or contrary views see, Leo Pfeffer, *Church, State and Freedom* (Boston: Beacon Press, 1967) Leo Pfeffer, *God, Caesar and the Constitution* (Boston: Beacon Press, 1976).

[114] *School District of Abington Township Pennsylvania v. Schempp* 374 US 203, 217 (1963).

[115] 374 US at 237.

[116] McCollum, supra, at 237–238.

[117] *Ishmael Jaffree v. Board of School Commissioners of Mobile County*, Civil Action no. 82-0554-H, January 14, 1983 (slip opinion).

[118] *Jaffree v. Board of School Commissioners of Mobile County* 74 c. Ed. 2d 924, 926 (1983).

[119] *Ishmael Jaffree v. Board of School Commissioners of Mobile County*, No. 83-7047, May 12, 1983 (slip opinion).

A Restatement of the Intended Meaning of the Establishment Clause in Relation to Education and Religion

John Remington Graham[*]

I. INTRODUCTION

On January 1, 1802, President Thomas Jefferson wrote Mssrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson an innocent and gracious letter:

> Gentlemen:-The affectionate sentiments of esteem and approbation which you are so good to express towards me, on behalf of the Danbury Baptist Association, give me the highest satisfaction. My duties dictate a faithful and zealous pursuit of the interests of my constituents, and in proportion as they are persuaded of my fidelity to those duties, the discharge of them becomes more and more pleasing.
>
> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.
>
> I reciprocate your kind prayers for the protection and blessing of the common Father and Creator of man, and tender you for yourselves and your association, assurances of my high respect and esteem.[1]

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[1] THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 332-33 (A. Koch & W. Peden eds. 1944) [hereinafter cited as SELECTED WRITINGS].

Mr. Jefferson did not intend his decorative metaphor of "a wall of separation between Church and State" to be a precise formulation of legal principle, as the full text of the letter — a social event, not an executive proclamation — plainly shows. Given the general and figurative sense of the words as used in context, the phrase is little more than a literary flourish of innocuous significance. Yet some have seized upon this language as if it were a venerable landmark carved in legal stone. The Danbury Baptist Letter, which is much discussed, but seldom read, is supposed to demonstrate that the establishment clause prohibits any contact between government and religion.[2]

If that abstract principle were taken as universal law in this country, and strictly applied without qualification, it would be unconstitutional for any organ, branch, magistrate, or employee of the government of the United States, or of any state, by any official act or use of property, to promote, protect, or acknowledge any usage, belief, practice, phrase, symbol, institution, conduct, or undertaking having even a remotely religious meaning. It would be unconstitutional to permit a magistrate of government to take an oath instead of an affirmation when assuming the duties of office. The preamble of the Minnesota Constitution, which says that the people are grateful to God for the gift of freedom, would be legally improper. Our coinage would reflect an unconstitutional trust in God. Pope John Paul II, who was welcomed with full state honors in communist Poland, could not be permitted to say Mass on the government-owned mall near the Washington Monument. Naturally, it would be unconstitutional to tax church property differently than other private property. And, of course, any governmental tax relief or spending tending to foster the welfare of religious schools, or to ease the burdens of parents sending their children to such institutions, would be constitutionally prohibited.

There are only a few ways out of this cul-de-sac. We must either grant that all these implications follow from the notion of separation of church and state as a constitutional principle and see to it that the supposed demands of the first amendment are fully enforced, or we must acknowledge that complete separation of church and state is politically too demanding, and escape the more unpopular consequences, case by case, by using some pragmatic formula made as palatable as possible by judicial rhetoric. We can, however, take another, more fundamental approach: we can reexamine the original meaning of the establishment clause to determine whether there is something radically unsound about the separation doctrine. This article will pursue the last-mentioned alternative.

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[2] The paradigm judicial statement of the separation doctrine is the so-called "Everson Rule" in Everson v. Board of Educ., 330 U.S. 1 (1947): "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another." *Id.* at 15 (opinion of Justice Black).

One particularly difficult problem under the establishment clause is caused by various statutes or other governmental acts designed to promote religion as a phase of education. In this area the cases have applied the idea of separation of church and state with varying degrees of rigor. An examination of some of the more sweeping separationist decisions of our day provides insight into what absolute separationism really means.

In *Tudor v. Board of Education,*[3] the New Jersey Supreme Court held that a public school board resolution permitting free distribution of copies of the King James Bible to students on the premises of primary and secondary schools, after hours and with parental consent, violated state and federal guarantees against governmental establishment of religion. The King James Bible is one of the greatest works of religious literature ever published. If free distribution of a book containing the thrilling story of David and Goliath were unconstitutional, the same would hold for an anthology including the tale of St. George and the Dragon. Suppose some organization wished to distribute copies of the *Bhagavad Gita* in which the General Arjuna and the Lord Khrishna discourse on the eternal significance of battle. Or suppose the work were Plato's *Phaedo* in which Socrates eloquently discusses life after death before drinking hemlock. If the New Jersey Supreme Court were right, it would appear inescapable that authorized distribution of any of these works to children on public school premises, even after hours and with parental consent, would be unconstitutional. This construction would be manifestly correct if the establishment clause required literal separation of, hence no contact between, government and religion.

In *Committee v. Nyquist,*[4] the United States Supreme Court struck down a state law providing for direct grants to qualifying primary and secondary nonpublic schools for maintenance and repair of facilities and equipment, tuition reimbursement to parents of children attending such private schools, and certain income tax relief to such parents. Against this backdrop, in *MCLU v. State*,[5] the Minnesota Supreme Court held unconstitutional, as a law respecting an establishment of religion, an intricate statutory scheme of tax credits for parents paying educational costs to send their children to nonpublic primary and secondary schools. The statute disallowed credits to the extent of costs for material used in religious instruction, and was designed to make it financially possible for lower-income families to enjoy private education, whether secular or sectarian, thereby reducing the cost of public schools borne by taxpayers of the state. The opinion of the court was written by Justice Todd, who considered certain precedents of the United States Supreme Court, particularly *Committee v. Nyquist*, and concluded that the measure was invalid. The crucial principle, or *ratio decidendi*, was that if a statute has not a primary tendency, but any tendency to advance the interests of religious denominations, it cannot pass constitutional muster. Justice Yetka wrote in a concurring opinion,

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[3] 14 N.J. 31, 100 A.2d 857 (1953), *cert. denied*, 348 U.S. 816 (1954).

[4] 413 U.S. 756 (1973).

> I do not fear that the legislation at issue in the instant case would somehow foster the establishment of any religion. . . . Our legislature appears now to be barred from making any reasonable effort to insure that nonpublic education will survive except for the very wealthy. However, the highest court of our land has spoken, and this court must adhere to its word.[6]

Perhaps the Minnesota Supreme Court was right in its reading of the *Nyquist* case. If there can be no relationship at all between government and religion, there simply can be no direct or indirect public support of private education. Justice Yetka, therefore, may have been perfectly accurate in his comments concerning such a doctrine.

Since *Committee v. Nyquist* there has been further litigation, as if to ask the Justices of the United States Supreme Court if they really meant what they seemed to say. The answer has been an equivocal "maybe, maybe not."[7] While a simplistic doctrine of church-state separation has the virtue of predictability, its great vice is an eventual government monopolization of education.

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[5] 302 Minn. 216, 224 N.W.2d 344 (1974), *cert. denied*, 421 U.S. 988 (1975).

[6] 302 Minn. at 236, 224 N.W.2d at 354-55 (Yetka, J., concurring).

[7] *See, e.g.*, Committee for Pub. Educ. v. Regan, 444 U.S. 646 (1980)(New York statute appropriating public funds to reimburse nonpublic schools for performing various services mandated by the State does not violate establishment clause if its purpose does not advance religion); Wolman v. Walter, 433 U.S. 229 (1977)(statute authorizing various forms of aid to nonpublic schools, most of which are sectarian, is not unconstitutional);

II. Preliminary Critique

A central premise of the judicial trend being discussed is that tax support of public education is religiously neutral. A few years ago, Dr. Onalee McGraw published an incisive challenge to this assumption.[8] She claims that evidence indicating a fall of academic standards in public schools can be explained by the infusion of humanistic values into the curricula of instruction. She argues that children in public schools are systematically taught situation ethics, ethical relativism, and the like; and that these systems actually displace or compete with traditional, natural-law values of Judeo-Christianity. She contends further that this process of indoctrination has been so over-emphasized in some places as to exclude adequate focus on reading, writing, factual knowledge, logical reasoning, and mathematics.

This proposition should no doubt be considered with caution. And in the view of this writer, it misses the mark to condemn the religious philosophy of Humanism, which rests on a tradition as old as Epicurus, and to extol the precepts of Judeo-Christianity. But it is relevant to note that a distinctive moral system is taught with the help of public funds in some public schools. In a proper legal sense, Humanism[9] is a religion,[10] and a venerable one at that. Educators are not to be condemned for attempting to teach children how to think in moral terms. No education would be sufficient, or even possible, without instruction concerning what ought to be, as well as what is.

This consideration provides us with a key. The first amend-

Roemer v. Maryland, 426 U.S. 736 (1976)(statute providing public aid to qualifying colleges and universities does not violate first amendment's establishment clause); Meek v. Pittenger, 421 U.S. 349 (1975)(loans of instructional materials and equipment to nonpublic schools violates establishment clause). In an attempt to reconcile the notions of "separation of church and state" and "religious neutrality," the Court used a three-pronged test, which had its apparent genesis in Lemon v. Kurtzman, 403 U.S. 602 (1971). According to this contemporary doctrine, to pass constitutional muster a statute must have an essentially secular purpose, must neither advance nor inhibit religion, and must not excessively entangle government with religion. *Id.* at 612-13.

[8] O. McGraw, Secular Humanism in the Schools: The Issue Whose Time Has Come (1976).

[9] *See* The Humanist Manifestos I and II (Prometheus Books 1976).

[10] *See, e.g.*, Torcaso v. Watkins, 367 U.S. 488, 495 (1961); Washington Ethical Soc'y v. District of Columbia, 249 F.2d 127, 128-29 (D.C. Cir. 1957).

ment ordains that there shall be "no law respecting an establishment of religion, or prohibiting the free exercise thereof." The word "religion" appears only once. Manifestly, the establishment clause and the free exercise clause deal with the same subject matter. On the face of the Constitution, whatever amounts to "religion" for purposes of free exercise is also "religion" for purposes of no establishment.[11]

Section 6(j) of the Universal Military Training and Service Act of 1951, and the Military Selective Service Acts of 1967 and 1971[12] provided exemption from conscription to persons who are conscientiously opposed to participation in war in any form by reason of religious training and belief. This provision has been interpreted to include persons who are opposed to all war, whether they believe in God or not, even if they belong to no religious sect, and who express their deeply held beliefs solely in worldly terms.[13] While these cases ostensibly turn on statutory construction rather than constitutional principle, an idea of "religion" defined in the broadest possible way emerges. This legal conception of religion is measured by depth of belief concerning right and wrong, and is at least influenced by the religion clauses of the first amendment.

Given a definition this broad, "religion" must permeate virtually all phases of human life including education. Thus defined, religion cannot be extracted or separated from any system of education, public or private. Why, therefore, should anyone be surprised to learn that Humanism should be taught or that some other religious influence, such as Hinduism or Judeo-Christianity, should be felt in public schools? Even if a teacher avoids the use of theological language or symbols in the classroom, he will, should, and must teach something about the foundations of right and wrong — and this amounts to "religion" in the legal sense under consideration here. If we take religion as the foundation of conscience, so as to encompass the whole human family, all education is religious, even in public schools. And why should this not be so? Religion does not cease to be taught simply because the institution is a so-called "nonsectarian" or "public" school. Religion and education are permanently married, regardless of the name of the institution, the source of revenues, or the method of instruction.[14]

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[11] *Cf.* Rutledge, J., dissenting in Everson v. Board of Educ., 330 U.S. 1 at 32. The United States Supreme Court has nevertheless adopted the contra-textual position that "religion" is broader for purposes of free exercise than for purposes of establishment. Specifically, under present case law, "religion" in the free exercise clause means any deeply held belief system which determines right and wrong for an individual, whether theistic, nontheistic, agnostic, atheistic, or antitheistic. In the establishment clause, "religion" means a formal organization or institution which teaches or promotes a religious doctrine, program, ritual, or ideology as an integral part of its mission. For a helpful analysis of how the United States Supreme Court arrived at this curious position, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 826-33 (1978).

[12] 50 U.S.C. app. § 456(j) (1968).

[13] Welsh v. United States, 398 U.S. 333 (1970); United States v. Seeger, 380 U.S. 163 (1965). In the *Welsh* case, Justice Harlan proposed that the establishment clause, no less than the free exercise clause, required this result. 398 U.S. at 360 n.12.

Clearly, then, there is some rudimentary deficiency in current judicial trends concerning the application of the establishment clause to statutes which provide for various kinds of public support of private schools. In order to untangle the difficulty, we must go to the roots of the problem. With that end in view this article will attempt, principally by analysis of legal history, to propound a number of propositions:

(1) The establishment clause is a corollary of, and historically developed from, the free exercise clause, which, in turn, evolved as a step beyond the Toleration Acts. (2) Both the free exercise clause and the establishment clause were premised on and presuppose the existence of God. (3) The notion of religion is exactly the same for purposes of both the establishment clause and the free exercise clause, *viz.*, recognition of the ultimate foundation of conscience and morality. (4) The free exercise clause guarantees governmental noninterference with peaceable religious freedom. (5) The establishment clause, aside from doing away with an official state religion supported by public monies, guarantees government neutrality toward or equal protection of all religions peaceably practiced. (6) In the constitutional sense, all persons have a religion, whether or not they believe in a personal deity or spiritual reality. (7) In the constitutional sense, religion inescapably permeates every phase of human life in which questions of right and wrong must be decided. (8) Whether public or private, sectarian or secular, all education is necessarily religious in the eyes of the law. (9) Support of education, including the religious phases thereof, is a proper function of government, so long as religious neutrality is observed. (10) Governmental assistance to private education, even if sectarian,

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[14] *Cf.* Toscano, *A Dubious Neutrality: The Establishment of Secularism in the Public Schools*, 1979 B.Y.U. L. Rev. 177 (explores questions relating to whether the concept of religious neutrality required in the public schools is real or illusory and suggests an alternative to the present religious neutrality doctrine).

is not only constitutionally permissible, but constitutionally obligatory, to the extent that such aid is requisite to achieve governmental neutrality in matters of religion.

III. The Historical Foundations

A. Principles of Constitutional Interpretation

Initally, it will be well to consider a time-honored rule of constitutional interpretation which was stated by Justice Story as follows:

> The safest rule of interpretation, after all, will be to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history, and to give the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure the ends proposed.[15]

We should heed the words of Justice Gray that the "scope and effect of . . . many . . . provisions of the Constitution are best ascertained by bearing in mind what the law was before."[16] Thus Justice Black reminds us, "It is never to be forgotten that, in the construction of the language of the Constitution . . . we are to place ourselves as nearly as possible in the condition of the men who framed that instrument."[17] Moreover, it has traditionally been held that the Constitution must be interpreted according to what was intended and cannot be changed save by amendment.[18] To be sure, there are other theories of constitutional interpretation suggesting that the courts should be free to change the fundamental law by interpretation reflecting their own views of public policy; but, this writer substantially agrees with the position of Professor Raoul Berger[19] and other contemporary scholars that the proper aim of constitutional interpretation should be ascertainment of the intended meaning, no more or less. It is beyond the scope of this article to do more than examine the intended meaning of the religion clauses of the first amendment, particularly the guarantee against the establishment of religion as applied to the problem of public support of private education, and to seek out along those lines a more equitable solution than currently exists under contemporary case law.

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[15] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 610-11 (1842).

[16] *Ex parte* Wilson, 114 U.S. 417, 422 (1885).

[17] Adamson v. California, 332 U.S. 46, 72 (1947)(Black, J., dissenting)(quoting *Ex parte* Bain, 121 U.S. 1, 12 (1887)).

[18] *See, e.g.*, Oregon v. Mitchell, 400 U.S. 112, 154, 288 (1970)(Harlan, J., and Stewart, J., concurring in part and dissenting in part); Vanhorne's Lessee v. Dorrance, 2 Dall. 304, 308 (Pa. 1795).

[19] *See* R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977).

B. The Law of the Mother Country

In the aftermath of the struggle between Pope Clement VII and King Henry VIII, the Crown became the head of the Church of England. As such the King could convene, prorogue, restrain, regulate, or dissolve all ecclesiastical synods or convocations, nominate and license elections of bishops, veto episcopal elections contrary to his nominations, and vest his bishops with temporal powers and estates; moreover, he could decide in dernier resort all appeals in ecclesiastical causes, both temporal and spiritual.[20] Parsons of the established church were entitled to the enjoyment of public lands, or glebes, and compulsory taxes, or tithes, under episcopal, and ultimately royal jurisdiction.[21]

The common law condemned the crimes of apostacy (renunciation of previously professed Christianity),[22] heresy (denial of essential doctrines of the church),[23] blasphemy (contemptuous reproaches of sacred personages),[24] as well as witchcraft, conjuration, sorcery, enchantment, and the like.[25] Anciently, the punishments for these offenses were severe: in Query XVII of *Notes on Virginia*, Thomas Jefferson observed that the common-law crime of heresy was punishable by burning at the stake pursuant to the writ of *haeretico comburendo*.[26]

In due course these old common-law crimes were displaced by more moderate acts of Parliament.[27] By the Statute of 9 & 10 William III, Chapter 32 (1699), it was provided that if any professed Christian denied the truth of the religion, the divine authority of the Bible, the divinity of the persons of the Holy Trinity, or either the singularity or the existence of God, he could lose capacity to hold any public office or trust on conviction for the first offense. And, on conviction for the second offense, one could lose capacity to be a suitor in court, a guardian, executor, legatee, or purchaser of lands, and could also suffer imprisonment for three years. By the Statutes of 1 Edward VI, Chapter 1 (1547), and 1 Elizabeth I, Chapter 1 (1558), reviling the Sacrament of the Lord's Supper was made punishable by imprisonment; while the Statute of 1 Elizabeth I, Chapter 2 (1558), provided that a minister speaking in derogation of the Book of Common Prayer was subject to the loss of benefice and imprisonment. Moreover, those who refused to attend services of the established church or other approved denominations were made liable to suffer money forfeitures.[28]

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[20] 1 W. BLACKSTONE, COMMENTARIES* 279-80, 377-80.

[21] *Id.* at 383-87; 2 *id.* at 24-33.

[22] 4 *id.* at 42-44.

[23] *Id.* at 44-45.

[24] *Id.* at 59.

[25] *Id.* at 60-65.

[26] SELECTED WRITINGS, *supra* note 1, at 274; 4 W. BLACKSTONE, COMMENTARIES* 46, 48.

[27] 4 W. BLACKSTONE, COMMENTARIES* 49-52.

Protestant dissenters from the Church of England were at one time subject to a number of disabilities and restrictions.[29] But by the Act of Toleration[30] in 1689, such dissenters were relieved of these disabilities and restrictions if they did not deny the Holy Trinity, took oaths or affirmations against popery, registered their congregations with the established church, and kept open meeting houses, and if their teachers acknowledged one true Christian faith as well as the doctrine of sacraments. Catholics, by contrast, were simply not tolerated. They were subject to heavy penalties and disabilities for hearing Mass, teaching school, keeping arms, and even for traveling to London. Their priests were deported and could be made liable for high treason should they stay in the kingdom for three days without conformity to the established church.[31]

The established church was also protected by the Corporation Act,[32] which act ordained that no person could hold public office, unless within the previous year he received the Sacrament of the Lord's Supper according to the rites of the Church of England and took an oath of allegiance to the Crown. The Test

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[28] *See* Act for the Uniformity of Common Prayer and Service in the Church, and Administration of the Sacraments, 1558, 1 Eliz. 1, c. 2, § 4; Act to Retain the Queen's Majesty's Subjects in Their Due Obedience, 1581, 23 Eliz. 1, c. 1, § 5; Act for the Better Discovering and Repressing of Popish Recusants, 1606, 3 Jac., c. 4, § 27.

[29] 4 W. BLACKSTONE, COMMENTARIES *53-54.

[30] Act of Toleration, 1689, 1 W. & M. 1, c. 18.

[31] *Id.* at 54-59.

[32] Act for the Well-Governing and Regulation of Corporations, 1661, 13 Car. 2, c. 1, § 12.

Act,[33] provided that no person could hold civil or military office unless he took an oath of allegiance to the Crown and made a formal declaration against transubstantiation.

C. *The Law of Colonial Virginia*

Virginia was settled primarily by adherents of the Church of England. It is therefore not surprising to see colonial statutes similar to those of the mother country. During the embryonic days of the colony, a statute was enacted for compulsory taxation to support the established church.[34] Other early statutes barred Catholics from holding office,[35] and Quakers from the colony.[36] At this same period of colonial infancy, there were statutes enacted to regulate the ministry and proprietary operations of the established church,[37] and even the manner by which subjects were to keep the sabbath.[38] All of these laws were amplified and continued up to the outbreak of the American Revolution.

There was also a general reenactment of the Statute of 9 & 10 William III, which punished certain forms of heresy and apostacy, together with adoption of the Toleration Act of 1 William & Mary, which gave limited relief to Protestant dissenters.[39]

From the foregoing survey, we may deduce several characteristic features of the laws of England and colonial Virginia respecting matters of religion:

(1) The King, who was chief executive magistrate of the civil state, was also temporal head of an established church. (2) The established church held public lands, and was supported by taxes paid by all persons without regard to religious belief. (3) The established church was regulated by public law. (4) Failure to conform to the doctrines and practices of the established church, however peaceable, could result in criminal penalties, civil disabilities, and monetary or proprietary forfeitures, unless excused by acts of toleration.

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[33] Act for Preventing Dangers Which May Happen From Popish Recusants, 1672, 25 Car. 2, c. 2, §§ 2-10. Compare the Test Act with U.S. CONST. art. VI, cl. 3: "[N]o religious Test shall ever be required as a Qualification to any Office or public trust under the United States." *Id.*

[34] 1 VIRGINIA STATUTES AT LARGE 144, Act 9 (W. Hening comp. 1823).

[35] *Id.* at 268-69, Act 51.

[36] *Id.* at 532-33, Act 6.

[37] *Id.* at 241, Act 1.

[38] *Id.* at 434, Act 3.

[39] 3 *id.* at 358-59, ch. 30.

D. *The 16th Article of the Virginia Bill of Rights*

These were conditions which the Virginia Convention of 1776 sought to abolish at the dawn of independence. This extraordinary assemblage, born in the throes of revolution, was the concrete, legal form of the new sovereign, which had displaced King George III who had violated the fundamental law, made war on his American subjects, constructively fled from the realm when his royal governor left by sea, and therefore abdicated by operation of the same principle of the English Constitution that wrought the ouster of King James II in 1688.[40] On June 29, 1776, Virginia formally seceded from the British Empire.[41]

A few weeks before this act of secession, the convention framed the famous Virginia Bill of Rights of 1776, which set forth essential conceptions of a republican form of government. Only the 16th Article need concern us here. As originally proposed, the provision read:

> That religion, or the duty we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, and not by force or violence; and, therefore, that all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience, unpunished and unrestrained by the magistrate, unless, under color of religion, any man disturb the peace, the happiness, or the safety of society; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.[42]

On motion of James Madison, the proposal was amended, then adopted on June 12, 1776, so as to read:

> That religion, or the duty we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore, all men are entitled to the free exercise of religion according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.[43]

The original draft of what became the 16th Article guaranteed the "fullest toleration in the exercise of religion." The final version guaranteed the "free exercise of religion." This little twist of phrase might first go unnoticed, but it was of enormous significance: it denoted a transition from the toleration of religious dissent in the presence of an established church associated with the sovereign power of the civil commonwealth, to equal and peaceable exercise of religious freedom, entirely disassociated with any established church. The seminal idea was that "free exercise," which was a step beyond "toleration," included an implicit abolition of the "establishment." And this seminal idea was amplified by the Virginia General Assembly in the ensuing years.

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[40] 1 W. Blackstone, Commentaries* 152, 245.

[41] 1 Virginia Statutes at Large 50-51 (W. Hening comp. 1823).

[42] C. James, Documentary History of the Struggle for Religious Liberty in Virginia 62 (1900).

[43] *Id.* at 62.

At the time of independence, there was still an established church in Virginia which enjoyed glebes and tithes. And the old colonial laws punishing various acts of religious dissent were still on the books.

The first General Assembly under the Virginia Constitution of 1776 immediately repealed all laws penalizing heresy, apostacy, and nonconformity; exempted all dissenters from payment of tithes and taxes in support of the established church; and suspended the operation of the most recent colonial statute providing for compulsory taxation to support the established church.[44] The suspension of such tax liability was continued further, then abolished in 1779.[45]

Still, the established Church of England in Virginia held title to public property, and was the official or established church of the Commonwealth. There was naturally a question of whether even this greatly reduced condition was lawful under the 16th Article of the Virginia Bill of Rights. Moreover, there was the question regarding the validity of the general assessment, a proposed scheme whereby every citizen should be compelled to pay a tax in support of some religious denomination of his own choosing. The great repealer of the first General Assembly[46] expressly provided, "That nothing in this act contained shall be construed to affect or influence the said question of assessment." These matters were subsequently dealt with by the Virginia General Assembly in the controversies over general assessment, church incorporation, and glebes liquidation.

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[44] 9 VIRGINIA STATUTES AT LARGE 164-65 (W. Hening comp. 1823).

[45] 10 *id.* at 111, 197.

[46] 9 *id.* at 164-65.

E. *The Virginia Statute of Religious Freedom*

In 1779 a bill was introduced in the Virginia General Assembly which provided substantially that Christianity, in one form or another, was the established religion of the Commonwealth; that all denominations of Christianity were entitled to the same peaceable rights of worship and practice; that all denominations of Christianity were entitled to incorporation and official recognition, so long as they subscribed to certain fundamental tenets, such as the existence of God and the divine authority of the Bible; and that every freeholder should pay compulsory taxes to support the clergy and places of worship of the Christian denomination of his choice.[47] This bill, after some debate, died without action one way or another.

But a similar bill, only slightly watered down, was introduced in the Virginia General Assembly on December 2, 1784.[48] The preamble of the bill read as follows:

> Whereas the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society, which cannot be effected without a competent provision for learned teachers, who may be thereby enabled to devote their time and attention to the duty of instructing such citizens as from their circumstances and want of education cannot otherwise attain such knowledge; and it is judged such provision may be made by the Legislature, without counteracting the liberal principle heretofore adopted and intended to be preserved, by abolishing all distinctions of pre-eminence amongst different societies or communities of Christians. . . .[49]

The initial debate was very heated and resulted in a layover of the bill to the 1785 session, largely for the purpose of securing the sentiments of the people of the Commonwealth. A great many petitions and memorials were presented on the subject, the most notable of which was the Remonstrance composed by James Madison.[50] Madison's Remonstrance eloquently condemned the proposed general assessment as contrary to the guarantee of free exercise of religion in the 16th Article of the Virginia Bill of Rights, as against the spirit of the American

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[47] H. ECKENRODE, SEPARATION OF CHURCH AND STATE IN VIRGINIA 58-61 (1910).

[48] *Id.* at 99.

[49] C. JAMES, *supra* note 42, at 129.

[50] *Id.* at 256-62 (appendix G).

Revolution, as unnecessary to the support of the civil government, as tending to frustrate the emergence of religious truth, and as contrary to the interests of public policy and domestic peace.

One noteworthy passage in the Remonstrance said,

> The religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature, an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their minds, cannot follow the dictates of other men. It is unalienable, also, because what is a right towards man is a duty towards the Creator. It is a duty of every man to render to the Creator such homage, and such only, as he believes is acceptable to him. This duty is precedent, both in order of time and in degree of obligation to the claims of civil society.[51]

It is apparent that Madison saw religion as a duty to God commanded by conscience, more fundamental than the duty to government commanded by law. In other words, Madison perceived religion as the paramount duty of conscience. It will be recalled that in 1776 the General Assembly of Virginia abolished all laws which punished the profession of atheism.[52] Yet it is indisputable that this enactment was constitutionally required by, and intentionally passed in, obedience to the 16th Article of the Virginia Bill of Rights, which was premised on the existence of God. Here we have a curious legal paradox: by law God exists, yet by the same law a citizen may deny the existence of God. In order to resolve this difficulty, it is necessary to say that God has a legal existence for all persons, whatever their philosophical or theological beliefs may be.

It is undeniable that all persons have some primary obligation of conscience drawn by some moral idea or impulse. Whatever the moral imperative or standard may be in specific terms for any individual, such must be his God for legal purposes. In other words, God may be legally defined as, and must have been considered by Madison to be, the foundation of conscience.

The 16th Article of the Virginia Bill of Rights said that religion is duty to God according to conscience. If we translate this into the legal framework just proposed, religion will be seen as following the ultimate dictates of conscience; or, to say the same thing in another way, the fundamental decisions of conscience—those which pertain to the most important questions in life—are religious acts in the eyes of the law. The right to make and execute such determinations, free from governmental interference, was protected by the 16th Article of the Virginia Bill of Rights, subject only to the limitation that no such religious or conscientious act be harmful to others.

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[51] *Id.* at 256.

[52] 9 Virginia Statutes at Large 164-65 (W. Hening comp. 1823).

When the Virginia General Assembly met in late 1785, not only was the bill for general assessment defeated, but a bill previously authored by Thomas Jefferson was introduced, and then passed on January 19, 1786.[53] This was the famous Virginia Statute of Religious Freedom. The enactment began with an invocation: "Almighty God hath made the mind free." This was in perfect conformity with the invocation of the "Laws of Nature and Nature's God" in the Declaration of Independence as drafted by Jefferson and adopted, without alteration in this respect, by the Second Continental Congress.[54] Far from ordaining a separation of church and state, the Virginia Statute of Religious Freedom proclaimed a cooperative friendship between the two: the existence of God who made the mind free was the statutory reason for governmental recognition of religious freedom.

Furthermore, this governmental friendship with religion was not to be confined to Christianity, but was to extend to all religions equally. Hence Jefferson said in his autobiography:

> Where the preamble declares that coercion is a departure from the plan of the holy author of our religion, an amendment was proposed, by inserting the word "Jesus Christ," so that it should read, "a departure from the plan of Jesus Christ, the holy author of our religion"; the insertion was rejected by a great majority, in proof that they meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and Infidel of every denomination.[55]

Surely Jefferson would likewise have endorsed the very expansive definition of religion recognized relative to the military draft in cases such as *United States v. Seeger*[56] and *Welsh v. United States*.[57] There was a well-implemented system of compulsory military service in Jefferson's day, and it appears that conscientious objection to such duty was actually considered as a right included in the free exercise of religion.[58] Hence, the then-existing constitutions of New Hampshire, New York, Vermont, and Pennsylvania all made reference to those who were "conscientiously scrupulous of bearing arms;"[59] whereas the constitutional ratification conventions of Virginia, North Carolina, and Rhode Island, in dealing with the same problem, mentioned those who were "religiously scrupulous of bearing arms."[60] This is another way in which the virtual identity of religion and conscience was made manifest for legal purposes. If in law religion is conscience, then in law everyone has a religion. If in law God is the foundation of conscience, then in law everyone has a God. These very broad and interacting ideas of God, religion, and conscience were part of American legal usage when Madison and Jefferson forged the principles which became the free exercise and establishment clauses of the first amendment.

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[53] 12 *id.* at 84, ch. 34; SELECTED WRITINGS, *supra* note 1, at 311-13.

[54] SELECTED WRITINGS, *supra* note 1, at 22.

[55] *Id.* at 47.

The preamble of the Virginia Statute of Religious Freedom reasoned that, since God is the author of religious truth and human freedom, religious truth will best become known if left uninterrupted by governmental coercion and favoritism. The main body of the statute was short and to the point:

> Be it enacted by the General Assembly, That no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.[61]

The statute simply said that a man cannot be taxed to support an official religion or an established church, and shall not be subject to any civil disability or criminal punishment on account of his peaceable and free exercise of religion. It did not lay down a sweeping and absolute rule that government and religion may never, under any circumstances, come into contact. It did not say that government may not encourage all religions on equal terms.

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[56] 380 U.S. 163 (1965).

[57] 398 U.S. 333 (1970).

[58] *See, e.g.*, J. Graham, A Constitutional History of the Military Draft 71-81 (1971).

[59] 4 American Charters, Constitutions, and Organic Laws 2455 (F. Thorpe ed. 1907); 5 *id.* at 2637, 3083; 6 *id.* at 3740-3741.

[60] 1 J. Elliot, Debates on the Federal Constitution 335 (1869); *Id.* Vol. 3 at 659; *Id.* Vol. 4 at 244.

[61] 12 Virginia Statutes at Large 86 (W. Hening comp. 1823).

The concluding section or paragraph of the statute said that religious freedom is a natural right. This necessarily means that it is a right of all human beings, including those who do not believe in personal deity or spiritual reality. The universality of religion contemplated by the statute serves to equate religion and conscience for legal purposes.

Finally, it should not be overlooked that the establishment clause of the Virginia Statute of Religious Freedom was simply a further exposition and clarification of the free exercise clause of the Virginia Bill of Rights. What one clause said about God, religion, and conscience was carried over into the other without alteration.

F. The Incorporation Act and Liquidation of the Glebes

On January 5, 1785, the Virginia General Assembly passed an "Act for Incorporating the Protestant Episcopal Church,"[62] which detailed the manner of deciding church questions, appointing officers and vesteries, selecting and removing ministers and holding church property, etc. The statute specifically reserved to the reorganized church the glebes or lands acquired for the old establishment at public expense prior to the revolution. Just after the enactment of the Virginia Statute of Religious Freedom, the evangelical denominations petitioned against the Incorporation Act because the Act maintained a degree of state control over church government and did not disturb church ownership of state-acquired property. On January 8, 1787, after a spirited controversy, the Virginia General Assembly passed a repealer[63] which abolished all state regulation of churches but left ownership of the glebes in the hands of the Episcopal Church.

The final stage of political controversy centered around the old glebes. The evangelical denominations argued that, "The colony had unjustly taxed dissenters to furnish glebes and churches for the establishment; the remedy was confiscation of the ecclesiastical property for the benefit of all citizens equally."[64] By way of defense, the Episcopal Church contended that "the contest for the glebes, churches, and chapels is not of a religious nature, but is to be decided by the rules of private property."[65] After years of struggle, the Virginia General Assembly succumbed to evangelical pressure, and, on January 20, 1802, passed a Confiscatory Act[66] providing for the liquidation of the glebes as they became vacant by reason of the deaths of incumbent parsons, and stipulating that liquidation proceeds were to be used for the benefit of the poor and other public purposes.

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[62] *Id.* Vol. 11 at 532, ch. 49.

[63] *Id.* Vol. 12 at 266, ch. 12.

The validity of the measure was raised by suit in equity brought by the vestrymen and church wardens of a vacant parish to enjoin sale of the glebe.[67] They contended that the church corporation could not be deprived of vested property rights retroactively and without just compensation, a perfectly sound proposition having nothing to do with religion as such. The Chancellor dismissed the bill, and an appeal was taken. The four judges of the Virginia Supreme Court were divided equally, so the decree of dismissal stood. Judges Tucker and Roane held essentially that the title of the established church was good before the revolution, having been vested by public donation; that the established church was dissolved by operation of the revolution; that, by reason thereof, title reverted back to the successor of the donor, which could only be the Commonwealth of Virginia; and that, therefore, the complainants had no title on which to sue for relief. Judges Carrington and Lyons answered that the revolution neither dissolved the established church, nor divested title to its lands then held, inasmuch as the governmental alteration of that time did not affect private property previously vested, and could only have prospectively changed the legal relation between the government and the church. Since the complainants were representatives of the legitimate successor to the old corporation, Judges Carrington and Lyons insisted that relief should have been granted.

A similar case reached the United States Supreme Court,[68] in which Justice Story held that the vestry of a vacant parish was the legitimate successor to the pre-revolutionary corporation. The church, the Court held, was not dissolved by the Revolution and continued to hold title to the parish glebe. Therefore, it was adjudged that the vestry was entitled to equitable intervention. That would seem to indicate final judicial condemnation of the Confiscatory Act.

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[64] H. EKENRODE, *supra* note 47, at 130.

[65] *Id.* at 136, 142.

[66] *Id.* at 147.

[67] Turpin v. Locket, 10 Va. (6 Call) 113 (1804).

[68] Terrett v. Taylor, 13 U.S. (9 Cranch) 43 (1815).

Notwithstanding the downfall of the Confiscatory Act for technical reasons, there can be no doubt of the constitutional principle, applicable at least prospectively, that no church or religious body may hold state-donated property acquired by state tax revenue. This is a perfectly natural inference from the Virginia Statute of Religious Freedom.

G. *Derivation of the Religion Clauses of the First Amendment*

Before attempting a summary of the foregoing, it would be well to consider how and why the free exercise and establishment clauses of the first amendment to the United States Constitution derive from, and therefore recapitulate respectively, the 16th Article of the Virginia Bill of Rights and Virginia Statute of Religious Freedom. In adopting the Federal Constitution, the Virginia Convention of 1788 annexed to its Ordinance of Ratification a long declaration of rights or proposed amendments to the new charter of the Union.

The 20th of these declarations reads as follows:

> That religion, or the duty we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established, by law, in preference to others.[69]

It is obvious that the language just quoted was paraphrased from the 16th Article of the Virginia Bill of Rights, save for the last clause which was a brief recapitulation of the Virginia Statute of Religious Freedom. James Madison, who had been a prominent member of the Virginia Convention of 1788, and one of the authors of the 20th declaration under consideration here,[70] was elected to the United States House of Representatives in the First Congress. There he ably executed his promise to secure a Federal Bill of Rights in order to secure the acceptance of the new Constitution.[71] Among his proposals in Congress on June 8, 1789, was an article which read:

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[69] 3 J. ELLIOT, *supra* note 60, at 659.

> The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.[72]

After further deliberations,[73] the House proposed an amendment which said, "Congress shall make no law establishing religion, or prohibiting the free exercise thereof; nor shall the rights of conscience be infringed."[74]

Following a joint conference between the House and Senate, Congress proposed, on September 25, 1789, the full Federal Bill of Rights as we now have it, including the language, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[75] Congress was full of rejoicing. Lest there be any doubt of an intent not to ordain a complete separation of government and religion, let it be well noted that the House and Senate passed the following resolution on September 26, 1789:

> Resolved, That a joint committee of both Houses be appointed to wait on the President of the United States, to request that he should recommend to the people of the United States a day of public thanksgiving and prayer, to be observed, by acknowledging with grateful hearts, the many signal favors of Almighty God, especially by affording them an opportunity peaceably to

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[70] *Id.* at 656.

[71] *See* B. Patterson, The Forgotten Ninth Amendment 86-217 (1955). This reprints portions of Volume 1 of Gales & Seaton's Annals of Congress covering the debates leading to the proposal of the Federal Bill of Rights to the several states for adoption.

[72] *Id.* at 110.

[73] *Id.* at 60-62, 196, 209. For an excellent, recent analysis of the debates in the First Congress in 1789 leading to the formulation of the present language in the free exercise and establishment clauses of the first amendment, see M. Malbin, Religion and Politics: The Intentions of the Framers of the First Amendment (1978). The author seeks to demonstrate that individual members of Congress who participated in these debates, and whose remarks were preserved in Gales & Seaton's Annals of Congress, believed the religion clauses they were framing would not prohibit nondiscriminatory governmental assistance to all religions on equal terms, contrary to the so-called "Everson Rule," *supra* note 2.

[74] B. Patterson, *supra* note 71, at 86.

[75] *Id.* at 89.

> establish a constitution of government for their safety and happiness."[76]

What then did Thomas Jefferson mean by the words "a wall of separation between Church and State" in the Danbury Baptist Letter? His reference was to the establishment clause in the first amendment and the Virginia Statute of Religious Freedom. In other words, he was not writing about a general prohibition of contact or interaction between government and religion at all. The so-called "wall of separation" simply meant that there shall be no official religion of state supported by public revenues, that there shall be no penalties for the peaceable and free exercise of religion, and that all religions shall enjoy equal protection and friendship of the government.

There is another point about the Danbury Baptist Letter which is often overlooked. Jefferson plainly stated that the religion clauses of the first amendment were designed to protect the "rights of conscience." He certainly had in mind a sweeping idea of religion, an idea large enough to encompass the fundamental or primary demands of conscience for all men. Religion in this sense is so pervasive that it simply cannot be literally separated, or severed of all contact, from the operations of government. Jefferson's "wall of separation," therefore, should not be taken as a rigid rule that the government must never touch the religious affairs of men.

IV. GENERAL SUMMARY AND SPECIFIC FOCUS ON EDUCATION

From this survey, we may take a panoramic view of the intended meaning of the religion clauses of the first amendment:

(1) The civil government may not be associated with an official, preferred, or established church or religion; (2) Nevertheless, government and all forms of religion equally stand in perpetual friendship; (3) No church, ministry, or place of worship run by a particular denomination may be supported by tax revenues, or hold property purchased with tax revenues; (4) No legal disabilities, forfeitures, or penalties of any kind may be consequent on the peaceable exercise of religion; (5) God has a legal existence, which may be officially acknowledged, and a legal definition, *viz.*, the foundation of conscience; (6) For legal purposes, religion is recognition, in word or deed, of God or the ultimate

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[76] *Id.* at 216.

basis of morality; And (7) the civil government may not regulate the peaceable exercise of religion, including the conduct of the religious affairs of any church, ministry, place of worship, or individual.

When the free exercise and establishment clauses are put into proper perspective, it is easier to understand why active governmental support of private and sectarian education is not unconstitutional, even where religious denominations are tangibly aided, so long as overall religious neutrality is observed.

For reasons already explained, this writer considers the intended meaning of the word "religion" in the first amendment to be a practical synonym of conscience or recognition of the ultimate basis of morality. If this theory is right, then religion, in the legal sense, is so broad as to be an inevitable permeation into virtually all phases of human life and society. One can be a militant atheist, or a devout churchman; but, in either case, there is a religion in the eyes of the law, for both undeniably seek a final measure of right and wrong. Given this premise, it follows that religion, whether so designated or not, is a necessary unavoidable part of education, as much so as physics or grammar. Hence, if tax subsidies, credits, deductions, or other direct or indirect relief to education were unconstitutional whenever religion of one kind or another were promoted, such support of all education would be unconstitutional. It is most evident that our constitutional guarantees of religious liberty were never intended to inhibit the activities of civil government in promoting education. From this it follows that public support of private education, whatever its religious content may be, is generally consistent with our fundamental law.

Nevertheless, in the interests of fairness to those who think otherwise, let it be postulated that the framers of the first amendment had a much narrower idea of religion in mind than this writer has supposed. Assume, for the sake of discussion, that our forefathers considered religion to be a personal relationship between man and spiritual God, a theological deity as such. In that case, an atheist or humanist would have no religion in the legal sense. All or most persons who do not believe in a Supreme Being would find no legal protection in the religion clauses of the first amendment. It is hard to imagine how this could be reconciled with the lofty thinking of James Madison and Thomas Jefferson. And, assuming that this narrow idea were the intended meaning of the word "religion" in the first amendment, and that the intended meaning must control constitutional interpretation, some very large changes would have to be made in our contemporary jurisprudence. Out would go cases such as *Torcaso*,[77] *Seeger*,[78] and *Welsh*.[79]

But even assuming all this, what of the problem of public support of private education under the intended meaning of the establishment clause? It is clear enough that the establishment clause originated from the Virginia Statute of Religious Freedom, which merely prohibited tax support of religious worship or ministry, and prohibited legal disabilities or penalties imposed on account of individual religious belief or practice. The statute did not mention, much less prohibit, public support of any kind of education. If it said anything about this subject by way of implication, it said that public support of all education shall be as equal as possible, regardless of whether the teaching reflects one sectarian viewpoint or another. Even given the narrow view of religion here supposed, a denial of public money on account of religious content or perspective built into an educational curriculum would be a legal discrimination against religion, a civil disability, which the Virginia Statute of Religious Freedom and the establishment clause of the first amendment were designed to forbid.

In any event, tax support of a church, ministry, or place of worship was considered constitutionally different from tax support of education. As evidence of this, we may note the satisfaction of a clergyman in Virginia around 1850, who commented that, despite the Virginia Statute of Religious Freedom, "Religion and morals have not suffered. Four colleges, two theological seminaries, and the University have been added to the public institutions for instruction."[80] Indeed, Thomas Jefferson, the author of the Virginia Statute of Religious Freedom, clearly recognized "moral philosophy" as a normal part of public education in Query XV of *Notes on Virginia*.[81] And in a letter of April 21, 1803, to Dr. Benjamin Rush, Mr. Jefferson outlined his view that the principles of Judeo-Christianity—"religion" properly so-called—were an indispensible part of the evolution of moral philosophy.[82] As father of the University of Virginia, Jefferson certainly envisioned religion as an important phase of education.[83]

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[77] 367 U.S. 488 (1961).

[78] 380 U.S. 163 (1965).

[79] 398 U.S. 333 (1970).

[80] C. JAMES, *supra* note 42, at 140.

[81] SELECTED WRITINGS, *supra* note 1, at 267.

The Northwest Ordinance,[84] which was reenacted by the same Congress that framed the Federal Bill of Rights, contained two noteworthy provisions: "No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments . . . . Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[85] It is impossible to reconcile this language with an interdiction of direct or indirect tax support of education simply because some part thereof is religious.

Finally, let it be observed that the Statutes of 1 James I, Chapter 4 (1603) and 3 James I, Chapter 5 (1606) provided that if a parent sent his child abroad for education under Roman Catholic auspices he would forfeit 100 pounds. Likewise, the Statute of 3 Charles I, Chapter 2 (1628) ordained that if a parent sent his child abroad for education in a Catholic institution to strengthen the religious conviction of the youth, he would incur important substantial disabilities and forfeit all his property.[86] While it is doubtful whether these statutes were ever received in America,[87] the 16th Article of the Virginia Bill of

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[82] *Id.* at 566-70.

[83] *See* Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor*, 1978 B.Y.U. L. REV. 645. *See also* Reed, J., dissenting in Illinois v. Bd. of Education, 333 U.S. 203, 245-47 (1947).

[84] Northwest Ordinance, ch. 8, 1 Stat. 51 (1789).

[85] *Id.*

[86] 1 W. BLACKSTONE, COMMENTARIES* 451.

[87] The Virginia Convention of 1776, which enacted the 16th Article of the Virginia Bill of Rights, also passed a general provision for the reception of English common law which said,

> That the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of king James the first, and which are of a general nature, not local to that kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations, and resolutions of the general convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the legislative power of this colony.

9 VIRGINIA STATUTES AT LARGE 126, ch. 5 (W. Hening comp. 1823). It is questionable whether the English statutes mentioned in the text could be characterized as general statutes in aid of the common law. But assuming they were, the reception provision above could countenance no more than the statutes of 1 and 3 James I. If received, these statutes of James were abolished by the 16th Article of the Virginia Bill of Rights en-

Rights and the Virginia Statute of Religious Freedom, thus also the free exercise and establishment clauses of the first amendment, were certainly designed to prohibit features of this kind.

In other words, our constitutional mandate of religious liberty prohibits government from imposing financial or other penalties on parents who have chosen to send their children to schools organized or managed by some religious denomination. Parents plainly have the fundamental right to choose the religious exposure of their children in education,[88] without suffering government-created discrimination. Granting this, it is surely unconstitutional not to accommodate in some degree those parents who send their children to private schools for the sake of religious exposure.

When government establishes a system of public education, expenditures for fixed costs simply must be paid by public revenues raised from taxable wealth without regard to other considerations. Otherwise, the undoubtedly legitimate end of government-maintained education would be altogether impossible.

But government expenditures to pay the variable costs of education are another matter. As to these, there is room for flexibility to account for different kinds of education, including public, private, secular, and sectarian forms. With respect to such outlays, the aim of government should be to equalize the benefit made available to each student within each category for which support is provided, regardless of religious exposure in educational experience. While mathematical precision is not achievable, this should be required to the extent practically possible, because all education is religious, and all religions are properly equal before the law.

Therefore, if a parent sends his child to a private school, the child should receive the same practical equality of variable-cost benefit from public money as any other child in the community. On the other hand, the parent should not be required to pay more for that practical equality of variable-cost benefit than his tax liability would otherwise indicate. To whatever extent tax adjustments or school subsidies may be needed to achieve this end, in the admittedly rough terms in which government must operate, they ought to be granted. The reason is that, without

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acted by the Virginia Convention of 1776, as enforced by the Virginia General Assembly in Chapter 2 of the Acts of October, 1776.

[88] Wisconsin v. Yoder, 406 U.S. 205, 222 (1972); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

these aids, the parent would suffer a money forfeiture in consequence of selecting the religious exposure of his child's education, the same sort of thing that the Statutes of 1 and 3 James I imposed, and that the first amendment was intended to forbid.

V. Conclusion

Our constitutional guarantee against the establishment of religion has been warped by a destructive dogmatism built upon a mild figure of speech. The establishment clause, in its intended meaning, prohibits any government-ordained religion, but does not require absolute separation of church and state. In its primary thrust, the establishment clause was intended to guarantee equal protection of all religions peaceably practiced. When considered in relation to its origins, the establishment clause not only allows public support of private schools, including those which are explicitly and formally religious, but actually requires the government to do whatever is reasonably necessary to assure that all proper education is treated with practical equality. The support of education is certainly a legitimate function of government, and all education is religious. Therefore, our judiciary should jettison all traces of separationism in passing on the constitutionality of statutes supporting private education. Instead, it is time for the courts of this country to consider statutes supporting public and private education together, and to adopt a new constitutional standard that will assure practical equality of variable-cost government support for each child, regardless of the religious exposure in his educational experience, and without imposing unnecessary burdens on parents who have made a conscientious choice of nonpublic schooling. This is true freedom of religion, and a blessing the first amendment was intended to secure.

In Defense of Religious America

Terry Eastland

“Religion in American life, Mr. Cadwell. We need it.” That is the concluding line of a radio commercial which for some, perhaps providential, reason I have had occasion to hear several dozen times over the past year. It is not an advertisement for any particular religion, just religion itself, which presumably could be Christian or Jewish or Muslim or Hindu or—though I think the commercial's sponsors did not quite have this in mind—the Reverend Sun Myung Moon's. It is an innocuous ad, so ecumenical as to be able to effect no conversion to anything. But concerned as it is with religion in American life, the message serves beautifully as a kind of theme song for our times. It implicitly raises the question brought up by the activities of so many others in the past year, from Jerry Falwell to the American Civil Liberties Union: what should be the place of religion in American life? What, that is, should be the place of religion, not so much in the life of any one individual American as in American civil society?

Discussion of this question has not been especially enlightening. It has centered almost exclusively on the First Amendment, and the reflections on the First Amendment have themselves been unhelpful. Columnists and politicians have been content to repeat the mythology most famously (though not originally) articulated by Chief Justice Earl Warren when he said that the First Amendment “underwrote the admonition of Thomas Jefferson that there should be a wall of separation between church and state.” The Chief Justice had a way with history, but for the sake of accuracy—and much else besides—it should be noted that Jefferson said what he said in 1802, when he was President, in a letter to the Danbury Baptists. However interesting Jefferson's thoughts may be, and however much we may wish today to regard his views as authoritative on church-state matters, this letter is simply not relevant to a consideration of the framing of the First Amendment and its original intention—unless of course Jefferson had been sitting in Congress in the summer of 1789 (in fact he was in Europe as Secretary of State and would not return until the autumn).

The invocation of Jefferson obscures history by implying that the Founding Fathers were hostile to religion, since in today's usage the idea of a wall connotes antagonism and suspicion between the two sides thus separated. As a matter of historical fact, the Founding Fathers believed that the public interest was served by the promotion of religion. The Northwest Ordinance of 1787, which set aside federal property in the territory for schools and which was passed again by Congress in 1789, is instructive. “Religion, morality, and knowledge being necessary to good government and the happiness of mankind,” read the act, “schools and the means of learning shall forever be encouraged.”

It is only from history, not from clichés about history, that we can understand what we once were as a nation in regard to religion, and what we have since become. Let me therefore start with these propositions: that there was a principal religion in American life from 1620 until roughly 1920; that this religion was Protestant Christianity; and that Protestant Christianity has been our established religion in almost every sense of that phrase.

The one sense in which Protestant Christianity was *not* established, of course, was as our national religion. There never has been a Church of the United States, complete with a bishop and supported by tax revenues, as in England. Nor can there be one: the First Amendment to the Constitution did make sure of that. But nothing *more* than that.

The intention of the framers of the First Amendment was not to effect an absolute neutrality on the part of government toward religion on the one hand and irreligion on the other. The neutrality the framers sought was rather among the sects, the various denominations. Accordingly, as Michael J. Malbin has shown, although there could be no national establishment of a sect, there could be state aid to religious groups so long as the assistance furthered a public purpose and so long as it did not discriminate in favor of some or against others; all sects, in other words, would have to be benefited.*

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* *Religion and Politics: The Intentions of the Authors of the First Amendment* (American Enterprise Institute, 1978).

The perspective of colonial history in the period dating from the Great Awakening makes it all the more clear that the First Amendment could not have been meant to enforce neutrality by government as between religion and irreligion. The Society for the Propagation of the Gospel, a sort of missionary arm of the Church of England, had been in business in America since 1701. For three-quarters of the 18th century, and especially in the years just prior to the Revolution, a widespread religious attitude in America was fear—fear that the Crown would establish the Anglican religion. The principle of non-establishment of a particular denomination was a product of this historical period, and the First Amendment applied this principle at the national level. Throughout the late 18th and early 19th centuries the principle was similarly applied at the colonial and, later, the state levels. As at the national level, so at the state level: no one denomination was to be given state support; there had to be neutrality among sects.

Thus, if Anglicanism could not reign in a given colony or state, neither could Congregationalism. The Anglican establishments in Maryland, South Carolina, North Carolina, and Georgia were wiped out before 1776, and Virginia's died finally in 1802. Congregationalism held on long past 1791 in Massachusetts, Connecticut, and New Hampshire, but by 1833 had lost its privileged status in all of these states.

It should be noted that although these establishments were of different sects, they belonged to the same religious family tree—that of Protestant Christianity. This is hardly surprising. The original colonies were English, and their English settlers were primarily Protestant. The non-English minorities—the Scots, the Scotch-Irish, the French, the Dutch, the Swedes, the Germans—were also mostly Protestant. There were only a few Catholics, mostly in Maryland, and even fewer Jews. This relative mix would endure until well past the middle of the 19th century.

The heavily Protestant orientation of the churchgoers of early America should not obscure the fact that many if not a majority of Americans were unchurched in the 18th century. But with a very few exceptions these unchurched were not freethinking atheists or agnostics. Hence, while the principle of non-establishment could be extended to prohibit the establishment of one particular religion (and not just the sects within a religion), few people were sufficiently bothered, as a practical or theoretical matter, to make this extension. The prominent exception was Madison, who believed that Christianity should not be favored over any other religion. Yet even Madison agreed on the general proposition that so far as the public interest was concerned, religion itself was better than irreligion.

THE particular sects, then, had been disestablished at the state level by 1833. But Christianity had not been, and would not be, until much later. In the early part of the 19th century, states set up both by constitution and statute provisions declaring it the duty of all men "to worship the Supreme Being." States also regulated membership in Christian denominations, imposed fines for failure to fix the worship hour on Sundays, and even mandated that elected officials believe in "the Christian religion."*

State courts did their part to support the Protestant faith. In 1811 the New York state court upheld an indictment for blasphemous utterances against Christ, and in its ruling, given by Chief Justice Kent, the court said, "We are Christian people, and the morality of the country is deeply engrafted upon Christianity." Fifty years later this same court said that "Christianity may be conceded to be the established religion."

The Pennsylvania state court also affirmed the conviction of a man on charges of blasphemy, here against the Holy Scriptures. The Court said: "Christianity, general Christianity is, and always has been, a part of the common law of Pennsylvania . . . not Christianity founded on any particular religious tenets; nor Christianity with an established church and tithes and spiritual courts; but Christianity with liberty of conscience to all men."

States also required the teaching of the Christian religion in state colleges and universities, and in prisons, reformatories, asylums, orphanages, and homes for soldiers. Furthermore, public aid was given to church-run hospitals and orphanages. Last, but certainly not least, many states required Bible reading and prayers in the elementary and secondary public schools.

Religion was far more integrated into the actual curriculum than these religious exercises might suggest. Textbooks referred to God without embarrassment, and schoolteachers considered one of their major tasks the development of character—an aim quite consistent, as we shall see, with America's brand of Protestant Christianity. The influence of William Holmes McGuffey (1800-1873), a Presbyterian educator and philosopher, was remarkable. His *Eclectic Readers* were published in 1836, and from that year until 1920—two years after Mississippi became the last state to institute a public-school system—his books sold more than 120 million copies, a total that put them in a class with only the Bible and Webster's Dictionary. McGuffey's *Readers* stressed, as the Northwest Ordinance did, "religion, morality, and knowledge," in that order.

AS WITH the public schools, so with almost every area of American life. The establishment of Protestant Christianity was one not only of law but also, and far more importantly, of culture. Protestant Christianity supplied

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*For this and following references, see Harold Berman, "The Interaction of Law and Religion," *Humanities in Society*, Spring 1979.

the nation with its "system of values"—to use the modern phrase—and would do so until the 1920's when the cake of Protestant custom seemed most noticeably to begin crumbling. But before coming to that moment we should reflect on the content of the particular religion that held sway in American life for the better part of 300 years, and remark more precisely on the significance of its "cultural" establishment.

As a general metaphysic, Protestant Christianity was understood in ways Catholics and Jews and deists could accept. Not only Protestant Christians but most people agreed that our law was rooted, as John Adams had said, in a common moral and religious tradition, one that stretched back to the time Moses went up on Mount Sinai. Similarly, almost everyone agreed that our liberties were God-given and should be exercised responsibly. There was a distinction between liberty and license.

Beyond this it is possible to be much more specific. Protestant Christianity was Reformed in theology, Puritan in outlook, experiential in faith. It was also evangelical in its orientation toward the world. These propositions held true of not only the denominations of Puritan origin (such as the Congregational, Presbyterian, and Baptist churches) but also those with more highly qualified views on the issue of predestination (such as the Methodist church) and those we might today consider "High Church" (such as the Episcopal church). Almost everyone drank from the same Reformation well, which happened to be the Westminster Confession of 1643. Reformation theology placed emphasis on the sovereignty of God and the depravity of man. It was a religion of the book—the Bible—that demanded the individual conversion of man and, in consequence, the living of a changed life.

This point had enormous social and political consequences. It is unlikely that a predominantly Catholic or Jewish America would have given birth to the type of society that eventually evolved by the late 18th century. The reason is that neither would have emphasized to the degree the American Puritans did the importance of personal development in the moral (and for them spiritual) sense of character formation. The Westminster Confession describes the preaching of the word as "an effectual means of driving them [sinners] out of themselves" and "of strengthening them against temptation and corruption, and of building them up in grace."

That is doctrine that will shape a man, and the shaping, molding emphasis of the American Puritans, the character-building emphasis, can even today be seen—literally seen—in needlework shops where samplers bearing the old, straightforwardly didactic Protestant American messages can be found. Often such messages take the form of edited Bible verses (from the King James version). Scripture was not incidental to the Puritan American. It was to be considered, meditated upon, learned by heart. "As a man thinketh in his heart," says the Bible, "so is he." The Puritans did not think only with their heads.

The American Protestant characteristically was driven out of himself, not only into Christ but also into the world. Hence the description—"this-worldly ascetic"—so often applied to individuals in Reformed communities. The change in the history of Christianity that this phrase suggests is seismic. After Luther it was no longer necessary to withdraw from the world (and into a monastery) to serve God. A man could serve God in the secular world. ("What is the chief and highest end of man?" asks the first question of the Larger Catechism of the Westminster Confession. "Man's chief and highest end is to glorify God and fully to enjoy Him forever.") Every job had a purpose, every man a calling, a vocation, no matter how lowly or how exalted. Working in *this* world, furthermore, men could transform the society about them, as the New England Puritans tried to do in their Bible Commonwealths. Though these societies failed according to their own ideals, the impulse to change society remained and would manifest itself in numerous ways, including the voluntarism of the 19th century, which became such a mainstay of American life.

AMERICAN Protestantism not only taught spiritual virtues but also the less heroic ones of sobriety, honesty, prudence, temperance, and diligence. In the context of these virtues, as Irving Kristol has often pointed out, capitalism made ethical sense. Protestantism was understood to tame and direct a man's interests, including his economic ones, toward worthy ends. Man was understood to be a steward upon earth, and he was to use his liberty and his talents responsibly (and diligently; there was to be no idleness, no sloth). There may be no more interesting text on this than Question 141 of the Larger Catechism of the Westminster Confession, which even as late as 1844 was described by Philip Schaff, a German writing on America's religious life, as "the reigning theology of the country." The question refers to the Eighth Commandment ("Thou shalt not steal") and asks what duties it requires:

> The duties required . . . are: truth, faithfulness, and justice in contracts and commerce between man and man; rendering to everyone his due; restitution of goods unlawfully detained from the right owners thereof, giving and lending freely, according to our abilities, and the necessities of others; moderation of our judgments, wills, and affections, concerning worldly goods; a provident care and study to get, keep, use, and dispose of those things which are necessary and convenient for the sustentation of our nature, and suitable to our condition; a lawful calling, and diligence in it; frugality; avoiding unnecessary lawsuits, and suretyship, or other like arrangements; and an endeavor by all just and lawful means to procure, preserve, and further the wealth and outward estate of others, as well as our own.

This answer offers much to reflect on; there is, for instance, the implicit approval of both commerce and the creation of wealth, even of one's own wealth. But the principal concern is man's duty, which is to have moderating effects upon his commercial activities. Tocqueville observed that the law allowed the American people to do everything, but that there are things which their religion prevented them from imagining and forbade them to dare. Religion—the Protestant religion here described—was thus a major source of the virtues a nation conceived in liberty always would need. It shaped the society and the individuals within it. Protestant Christianity helped answer the oldest of political questions: what kind of people, having what kind of character, does a society produce?

Tocqueville therefore was right to say that religion was America's "foremost political institution." It was the branch of government that the Constitution, based on self-interest and envisioning a commercial Republic, obviously could not create. Yet it was the branch essential to the maintenance of the Republic. It provided a check on the liberty guaranteed by our conventional political institutions. It was responsible for the character of the people. And as this "informal" branch of government, as our "foremost political institution," Protestant Christianity enjoyed its most significant form of "establishment."

IN THE past sixty years, we have witnessed the disestablishment of this religion. One could argue that it was bound to happen. Good American theory—as given by Madison—holds that the more factions the better for the Republic's chances of survival. This theory applies not only to economic interests but also to religious ones. Despite the fact that the nation had been settled by Protestants, other religious peoples could settle here, too, and eventually they did. The great immigrations from Southern and Eastern Europe after the Civil War brought millions of Catholics to the United States, and by the end of the 19th century a sizable number of Jewish and Eastern Orthodox communities were also flourishing.

Meanwhile, something was happening to the old Protestantism itself. Evangelical Protestant Christianity (revitalized by the Second Awakening in the early years of the Republic) had held on strongly throughout the first half of the 19th century, but after the Civil War the tendencies toward Arminianism—i.e., the belief in divine sovereignty *and* human freedom—that had been present even in the 18th century became far more pronounced.

On the one hand, a liberal variety of Protestantism developed. Liberal theology had little interest in Original Sin; indeed sin to it was nothing more than mere error. Liberal Protestantism emphasized instead man's freedom and his natural goodness. Dogma and the sacraments were slighted, and there was immense optimism about the human race. Influenced by Kant, liberal Protestants reduced Christianity to morality; they had no prophetic voice, to speak of (or with). Liberal Protestantism was an accommodation to culture. H. Richard Niebuhr perhaps best described its God as One "without wrath" Who "brought men without sin into a kingdom without judgment through the ministrations of a Christ without a cross."

Liberal Protestantism was not the only accommodation to culture. More conservative Protestants—the keepers of the old religious flame—proved to be poor stewards of it. The old Protestantism descended into revivalistic orgies, as brought to us most sensationally by Billy Sunday. Christianity was presented as something dulcet and sentimental, and as often as not it was allied to the pursuit of profit. Frequently the old Protestantism was served up as a civil religion—a heresy, as Jonathan Edwards, but not Billy Sunday, would have recognized. Here too, and not surprisingly, dogma was neglected. A remark by Dwight Moody's perhaps best captures this. "My theology!" he exclaimed, when asked about it. "I didn't know I had any."

In the 1920's H.L. Mencken would acidly but correctly assert that "Protestantism is down with a wasting disease." One of the deepest reasons for its condition was that the Enlightenment had finally made its way to America. By the end of the 19th century the higher biblical criticism had disturbed the Protestant theologians' confidence in their ultimate authority, the Bible. So had the modern sciences, not only the physical sciences (especially biology in the form of Darwinism) but also the newer, social sciences. Truth no longer seemed absolute but relative to time and place, and the insights into personality and society provided by psychology and sociology seemed at least as plausible as those found in the Bible.

The half-decade following the Civil War had been the great age of urbanization. The rise of the city had also seen for the first time in American history the development of an intellectual class, and it was not kind to the old Protestant faith. By the 20's it had become intellectual fashion not to believe in God and, if one were a writer, to attack "Puritanism."

WITH the great immigrations, the decline of the old Protestant religion, and the rise of an intellectual class not merely indifferent but hostile to religion, the stage had been set by the 1920's for the cultural disestablishment of the old faith. Indeed, it had begun earlier. The end of World War I in 1918 had inaugurated a period of laxity in morals and manners. This is typically what happens after wars, but the decade of the 20's eventually would prove to be a dramatic break from the past. For it was not followed by a recovery of the old morals and manners, as also typically happens after social upheavals; the Victorian era stayed firmly in the past. Church attendance declined throughout the 20's. People lost their fear of Hell and had less interest in Heaven. They made more demands for material fulfillment.

Such demands, of course, are as American as the Declaration of Independence, which after all sanctified the idea of the pursuit of happiness. That idea owed more to the Enlightenment than to the Bible; certainly it did not sail to America aboard the Mayflower. Since the Declaration of Independence America had held its commitments to liberty and to virtue in tension. By the 20's it was clear the tension had begun to resolve itself in favor of liberty. Americans now insisted, as William Leuchtenburg has noted, not only on the right to pursue happiness but also on the right to possess it. The 20's saw the beginnings of the installment-buying plan; it is impossible to imagine such a purchasing scheme in the American culture of 200 or even 100 years earlier.

Since the 20's the disestablishment of the old Protestant religion has taken place most obviously in the intellectual, governing, bureaucratic, and cultural classes, and to a lesser but no less real and increasing degree in the rest of society. Today the disestablishment is perhaps most easily detected on the college campus. Logical positivism may have long ago fallen out of favor among philosophers, but as a cultural attitude among intellectuals and academics it is still going strong. God-talk (the literal meaning of theology) is not fashionable, not even, it sometimes seems, in a college chapel.

The campuses of the old Protestant culture emphasized the importance of the Christian faith. Now their chapels still stand, but university policies have changed. There is probably no more striking instance of this than at Princeton University, over which both Jonathan Edwards and John Witherspoon once presided. Last year Princeton went looking for a new Dean of the Chapel. A Presbyterian of deep commitment and faith had retired, and his retirement provided the occasion for a reevaluation of the Dean's function. A trustee report came forth with a new job description: henceforth the Dean should be a person of "deep religious faith" but "above all, he or she must be personally gracious and open, and his or her own religious commitment must include sensitivity to the vulnerability of human finitude and the particularity and relativity of the views he or she espouses." The clauses following "above all" say everything that needs to be said about the distance Princeton has traveled.

Other evidences of disestablishment abound. Today the old idea that law has its roots in the Judeo-Christian ethic, as was believed at the Founding and throughout most of American history, is no longer much discussed, let alone believed in by many American legal philosophers and judges. The public philosophy of America, as Harold Berman has pointed out, has in the past two generations "shifted radically." Law is in theory no longer religious but secular; no longer moral but political and instrumental; no longer communitarian but individualistic. (People increasingly engage in "unnecessary lawsuits.") It is no wonder that Aleksandr Solzhenitsyn, at Harvard for the commencement address three years ago, left his audience stunned when he spoke of law in a religious context.

MEANWHILE, liberty, like law, has been severed from its religious basis. What Jefferson once called the "firm conviction" in the minds of Americans that their liberties derive from God is hardly so firm anymore, certainly not among political scientists, columnists, television personalities, and others who influence public opinion. Having been given its own existence, ontologically speaking, liberty fairly runs riot now. The distinction between liberty and license transmitted to us by the old Protestant culture has faded almost completely among the educated classes. Consider again the college campus, where the old doctrine of *in loco parentis* is out of fashion. Administrators now run their campuses as if there is no God, since virtually everything is permitted. Probably the most libertine societies in America today exist on those very campuses that were originally the creations of the old Protestant culture.

To be sure, many other parts of America are closing fast on the campuses. It is the style nowadays not only among the college-educated but also among many blue-collar workers to be economically conservative but socially and morally liberal. This, translated, means balance the budget but decriminalize marijuana and cocaine and let us have abortion on demand. If the liberalism of the 60's has a definite legacy, it is found in the far more liberalized and hedonistic lives many Americans, including many older Americans, and indeed many political conservatives, now lead.

The "Me-Decade" has been well chronicled. Perhaps less obvious, but no less significant, is the change in ethical *thinking* that has occurred throughout society. A book could be written on what has happened to the idea of character. People in authority—teachers, parents, and even ministers—resist the fact that they are in authority. They will not "impose" their values; the idea is to let the young "clarify" *their* "values" (now considered as relative as any matter of taste). Moral education is no longer rooted in the virtues of courage, temperance, prudence, and the like. It is full of form but empty of content. What matters is that you feel sure the "option" you have chosen for yourself is the right one for you. I have seen a course in "values clarification" offered to adults in a Presbyterian Sunday School curriculum—and as an "option," no less!

Perhaps because the old imperative of "America the Beautiful"—"confirm thy soul in self-control"—has become too hard to follow, ethical teaching, while studiously neutral about personal life, is assiduously assertive in social matters. Where once the major emphasis was on tidying up the individual soul, on making it conform to reality, now the focus has shifted to the external world, to tidying up the laws that regulate the public lives of man and man (or woman). Where people, whether of secular or religious disposition, seem to feel most comfortable, and certainly most confident, is in talking about "social injustice" or "racism" or "poverty" or "exploitation." Recently I joined a panel at a major university on the subject of religion and virtue. A participant who was a professor of theology centered most of his remarks on "corporate sin." I don't recall his once mentioning the idea of virtue, let alone any particular virtue. Sometimes it is hard to find a difference between what ministers and theologians say and what many secular intellectuals say.

This, then, is the picture so far of an America that has experienced the cultural disestablishment of its old religion, the dissolution of its once "foremost" political institution. Consideration of a few trends within the Supreme Court will help complete the picture.

In 1947 the Supreme Court, in *Everson* v. *Board of Education of Ewing Township*, said the First Amendment "requires the state to be neutral in its relations with groups of religious believers and non-believers." This new doctrine of neutrality not only would seem to forbid the establishment of a religion—as Madison would have had it—but also the establishment of religion in general over non-religion and thus irreligion.

With its doctrine of neutrality, the Court has denied substantial public aid to elementary and secondary church-related schools. And by striking down prayers and Bible readings and now, this past fall, even the posting of the Ten Commandments in the public schools, it has acted according to an implicit doctrine that the public schools should be secular—and "value-free."

In 1961, in *Torcaso* v. *Watkins*, the Court so enlarged the definition of religion that an observer might say irreligion had now become a religion. The Court decreed that neither a state nor the federal government can "constitutionally pass laws nor impose requirements which aid all religions based on a belief in the existence of God as against those founded on ***different beliefs***" (emphasis added). A footnote listed "Ethical Culture" and "Secular Humanism" among other examples of "religions" founded on "different beliefs."

In other contexts the Court has said that virtually anything may qualify as a "religion," so long as the "religious person" believes in whatever he believes in with, as Justice Black put it, "the strength of traditional religious conviction." This definition of religion celebrates individual conscience. It is hardly surprising that in cases involving "privacy" the Court has reduced public restrictions on private choice (as with its abortion decision in 1973). The legal trend here, like the cultural trend, has been toward a pronounced individualism in matters of religion and morals.

These trends of the Court round out the portrait. We are all "pluralists" now. And it should be stipulated that this is not altogether a bad thing. I doubt that any serious religious believer would wish a return to the days of intolerance that were an admitted ill of the old Protestant culture. But people who take religion seriously—and I mean here religion that has social and historical dimension, not merely something you might believe with "the strength of traditional religious conviction" in the midst of a Saturday night drunk—will find much in this picture that is disturbing. For the disestablishment of the old Protestantism has meant defeats not only for Protestants but for Catholics and Jews as well.

By contradicting the historical meaning of the establishment clause of the First Amendment, the Court has said, in effect, that promotion of religion is not in the public interest. Daniel P. Moynihan has correctly written that the recent decisions based on the establishment clause are "an intellectual scandal," and it is perhaps not too much to hope that the Court will one day reverse itself on this matter. Meanwhile, however, the severing of both law and liberty from their historic rooting in religion has serious and more immediate implications. Instrumentalists may argue that obedience to law can be brought about solely through the threat of coercive sanctions, but, as Berman has written, what is far more important is "the tradition of being law-abiding, which in turn depends upon a deeply or passionately held conviction that law is not only an instrument of secular policy but also part of the ultimate purpose and meaning of life."

As for the loss of the religiously-grounded distinction between liberty and license, we have all witnessed the proliferation of rights with no concomitant responsibilities that has been the result. With traditional religion now pushed to the margin of our public life, not only thanks to the Court's doctrines of neutrality and secularism but also, and more importantly, thanks to the pedagogy of school and college teachers alike, religion is less able to exercise its historic role as a political counterweight, as the voice of constraint and responsibility.

The shift in ethical thinking away from character formation toward personality adjustment and values clarification on the one hand, and social problems on the other, is perhaps the most disturbing change of all. The emphasis on virtues that the old Protestant culture provided was precisely what the Founding Fathers acknowledged their new Constitution could not provide. And yet the Founders also knew that just these virtues were what the best thinkers in antiquity had thought necessary to the maintenance of a republican order. If the old evangelical Protestantism had a special fire in it that burned the ancient virtues into the souls of men, the virtues themselves were not special to that faith. For these were virtues agreeable to Catholic and rabbinical tradition, to the Deists of the Founding period, to the Greeks and Romans. The old Protestant religion understood, as ancient philosophy did, that politics is ultimately about the cultivation of character. It is unclear today that our modern culture even understands this point, let alone wants to deal with it.[*]

Even so, it is answered, by default if not by design. Protestant Christianity is no longer America's "foremost political institution," but this fact does not obviate the need for a system of values in which Americans can move and live and have their commercial (and now leisure) being. If our morality is not engrafted upon Protestant Christianity, it will be engrafted on something else—God only knows what. The brilliance of the Founding Fathers did not anticipate this situation, but surely they did not believe that any institution could ever be "value-free." We are all the time engrafting our way of life upon *some* set of values.

IF WE ARE today a secular society, we are still also a liberal society. And in the current groping toward what inevitably will be our public philosophy, the religious person is entitled, if not to prevail, at least to be heard. The religious person can expect to be allowed a voice in matters of public policy. He can expect that his religion will not disqualify him from speaking on political matters, and that if he offers a religious or ethical justification for his position on a public issue, it will not *ipso facto* be considered out of the bounds of public discourse. The question here is ultimately one of where you get your basic beliefs. If, as Michael Novak has written, we should be willing to let people get their politics as much from the Bible as from Gloria Steinem, then biblical or religious values should be permissible in public debate. Unless the free exercise of religion, vouchsafed in the First Amendment, is to mean only trivial whispers, something practiced in the closet, then it must mean a voice equal to that of anyone who is not religious.

The trends go against even this minimal kind of free exercise of religion. It has been argued by serious public philosophers that only a rational, utilitarian morality should ever be enforced by law, and that this morality by definition would exclude any influenced by or grounded in religious considerations. Today this argument, spoken by non-philosophers, is used against the Moral Majority and their kind. You cannot legislate morality, it is said, meaning you cannot legislate a particular kind of morality—the kind having to do with religion as traditionally conceived.

History is not irreversible, but the trends for the past hundred years suggest that traditional religion will have an increasingly marginal influence on our public life. America is still one of the most religious countries in the world, and yet church affiliation (40 percent of Americans profess one) continues to decline, as Seymour Martin Lipset and Earl Raab noted recently in these pages ("The Election & the Evangelicals," March). These are just the circumstances to expect in a country to which the Enlightenment came late. The much-touted religious renaissance of recent years does not promise to change this state of affairs, at least not soon. Lacking is what has been lacking in much of American religious life for the past hundred years—solid theological content—and on this score the seminaries that have brought us the "death of God," "liberation theology," and other similar inspirations cannot inspire hope. As for the turning of a few scientists toward God, this is hardly a full-blown theological revolution. To postulate, as Sir John Eccles has done, that the brain is the product of evolution but that only God could have created the mind may prove an invaluable service to religion. But we are still a long way from any *Summa*, and a longer way from a great cultural movement.

One need not hold a brief for Jerry Falwell, nor for his cousin evangelists who appear on the television screen in the shank of the evening, to acknowledge what they have done, which at the least has been to flush the anti-religious bias out into the open. The early reaction to Falwell was dominated by comments from civil libertarians who implied, ironically enough, that Falwell had no right to speak out on public issues. Such was not the reaction when the Reverend Martin Luther King wrote his letter from a Birmingham jail, but the hypocrisy is less interesting, I think, than the secular bias that produced it.

If, someday, people with traditional religious views should be effectively banned from public debate, not only will the free exercise of religion have been denied but a new religion will have been culturally established as our "foremost political institution." It would no doubt look very much like what the Supreme Court alluded to in its *Torcaso* ruling—the religion of "secular humanism." God save us from that.

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[*] Can a government, asks Francis Canavan, "committed to absolute neutrality among 'religions' . . . be capable of educating anyone? . . . The right questions were raised, but not answered, by Justice Jackson in his dissenting opinion in *Everson* where he said: 'Our public school . . . is organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion. The assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion. Whether such a disjunction is possible, and if possible whether it is wise, are questions I need not try to answer' " ("The Impact of Recent Supreme Court Decisions on Religion in the United States," *Journal of Church and State*, Vol. 16, No. 2, 1974).

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Should Prayer Be Restored to Our Public Schools?

The Supreme Court has said no. Yet three out of four Americans favor voluntary school prayer—and the remedy is in Congress's hands

By Eugene H. Methvin

In 1962 the U.S. Supreme Court ruled by a six-to-one vote that voluntary prayers said in public-school classrooms violated the U.S. Constitution. Few Supreme Court decisions have stirred such public controversy and outrage, encountered such open disobedience* or stimulated such sustained efforts for reversal.

Public-opinion polls have shown that a stable majority of about 75 percent of Americans favors restoring public-school prayer. Last April the U.S. Senate, by a 51-40 vote, approved legislation introduced by Sen. Jesse Helms (R., N.C.) that would restore voluntary prayers to the classrooms. And once again the issue has touched off a torrent of mail to Capitol Hill, this time to the House of Representatives, whose members may soon consider the question.

The Senate's action would largely restore the situation that existed before the 1962 Supreme Court opinion: decisions would be left to the states or to local authorities, and justices in Washington would be out of the business of refereeing local arrangements for voluntary classroom prayer. Which is precisely the way the Founding Fathers, who wrote the First Amendment guarantee of freedom for religion, wanted it.

The First Amendment says: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." Those words, known as the establishment and free-exercise clauses, were meant to guarantee that religious matters would be decided at the local level.

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*Many schools simply disregarded the Supreme Court's ruling and continued to conduct prayers, freely excusing those who did not wish to participate.

The record leaves no doubt. When the First Amendment was presented to Congress in 1789, five states had established churches; others had recently disestablished or refused to establish churches. A major purpose of the amendment, as James Madison assured Congress, was to provide that the national government would have no power to disturb these local arrangements. It clearly forbade federal interference either *for* or *against* community decisions.

No one would have been more astonished at the Court's 1962 interpretation than the framers of the First Amendment. The same day in 1789 that Congress approved the Bill of Rights, the legislators asked President George Washington to proclaim "a day of public thanksgiving and prayer to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God." Washington thereupon issued the first Thanksgiving Day proclamation—an act that by the Warren Court's logic violated the First Amendment while its ink was still wet.

The more obvious conclusion is that it was the 1962 justices themselves who trifled with the Constitution. Said Harvard Law Dean Erwin Griswold: "We have a spiritual and cultural tradition of which we ought not to be deprived by judges carrying into effect . . . absolutist notions not expressed in the Constitution itself and surely never contemplated by those who put the constitutional provisions into effect. To say that they require that all trace of religion be kept out of any sort of public activity is sheer invention."

Yet that is precisely what the Warren Court decided in 1962, when the justices decided the Supreme Court's first prayer case. The New York State Board of Regents, in consultation with the clergy of Protestant, Catholic, Jewish, Greek Orthodox and other faiths, had developed this nonsectarian prayer: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country." Local school boards decided whether to use the prayer, and individual students could excuse themselves from participation if they wished. The Warren Court found this a violation of the establishment clause.

To reach its result, the Court had to ignore the First Amendment's clause forbidding the federal government to interfere in the "free exercise" of religion and adopt a new theory advanced by Justice Hugo L. Black. He contended that the establishment clause forbidding Congress to establish a religion had been applied to the states through the Fourteenth Amendment clause which says that no state shall "deprive any person of life, liberty, or property without due process of law." That language, the Court decided, somehow requires Washington[illegible] the form of the justices—to main[illegible] a "wall of separation between church and state," and strict "neutrality" between religion and irreligion.

Potter Stewart was the only justice to dissent: "With all respect, I think the Court has misapplied a great constitutional principle. I cannot see how an 'official religion' is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these schoolchildren to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our nation."

The Warren Court's coupling of the First and Fourteenth Amendments was a bold new seizure of authority from both Congress and grassroots institutions. Other decisions followed: The justices ruled against a Maryland law that provided for the reading of a chapter of the Bible and/or recitation of the Lord's Prayer in schools. When the Netcong, N.J., board of education voted to permit students to come to sch[illegible] arly for a "period for free exercise of religion" under the expressed First Amendment authority, the state court refused to allow it. This court even refused to permit schoolchildren to read the daily prayer of the House or Senate chaplain as printed in the *Congressional Record*. By not accepting the case on appeal, the Supreme Court justices let the state decision stand.

These anti-prayer decisions set off a wave of protest that has not stopped. At first, Capitol Hill opponents backed an amendment to the Constitution that would revise the Supreme Court's interpretation of the Fourteenth and First Amendments. In 1966, the Senate voted 49-37 to submit such an amendment to the state legislatures for ratification, but the vote was nine short of the constitutionally required two-thirds majority. In 1971, responding to a nationwide drive sparked by Ohio housewife Louise Ruhlin, the House voted 240-162 for an amendment, 28 short of the necessary two-thirds. In each case, many legislators balked for fear that the wording of such an amendment might be interpreted to do harm to other First Amendment provisions regarding freedom of speech and the press.

But today the outlook for prayer proponents is brighter. In the years since 1962, both the makeup of the Supreme Court and opinion about the limits on its powers have changed. The current Chief Justice, Warren E. Burger, has led this different Court in a substantial federalist restoration, curtailing some of the more ambitious activist claims of judicial power of the 1960s, pointing out, among other things, that Congress has remedies against such claims short of amending the Constitution. In fact, the Constitution provides two clear ways to limit the Supreme Court's role in the interpretation of our constitutional rights:

1. Article III, which created the Court, empowers Congress to make

"exceptions and regulations" to the Court's appellate jurisdiction. Thus, by a simple majority, legislators can vote to take whole classes of cases away from the Court's jurisdiction.

2. The Fourteenth Amendment, under which the Court claims authority to impose its interpretations of the Bill of Rights on the states, specifically provides: "The Congress shall have power to enforce, by appropriate legislation," the rights the amendment creates. So if the legislators disapprove of the Court's rulings, presumably they can pass statutes—again by simple majority—substituting their own rules.

For three decades the nation has seen decisions and responsibilities transferred from local communities to Washington, thus steadily eroding the federalist concept of our government. When Senator Helms introduced his legislation last April, he emphasized the significance of his proposal in maintaining the Constitution's original plan of a divided and carefully limited power: "Congress must not yield its responsibility under the Constitution to ensure that the freedoms protected by the First Amendment are not undermined by actions of other institutions."

That is why many legal and editorial commentators welcome the Senate move to moderate the harsh anti-prayer rules adopted by the Warren Court. Says columnist James J. Kilpatrick: "When Senator Helms undertakes to restore the possibility of truly voluntary prayer, he merits the support of all those who believe that, while governmental establishments of religion must be resisted, the free exercise of religion should be encouraged. The Constitution expressly authorizes Helms's approach as a form of restraint upon the judiciary short of a constitutional amendment."

Regardless of our views on voluntary classroom religious exercises, all Americans—Christian, Jew, atheist, agnostic, whatever—have cause for alarm when a group of officials in Washington claims the right to dictate radical changes in our lives without consulting us. By debating and deciding such matters locally, we actually strengthen our democratic traditions of tolerance and liberty.

In taking such decisions away from the people, the 1960s-era justices pushed the Court far along the road to a more sweeping tyranny than any that might result from a local excess of religious zeal. As Harvard law professor Raoul Berg says in his recent book *Government by Judiciary*, "A democratic system requires adherence to constitutional limits, by courts no less than presidents. Respect for the limits on power is the essence of a democratic society."

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Defending the School Prayer Amendment

By GROVER REES III

Recently I attended a state college graduation ceremony that began with an invocation by a rabbi and ended with a benediction by a Catholic priest. On the way home I heard a radio commentator denounce President Reagan's proposed constitutional amendment on school prayer. The amendment, the man said, is a radical assault on one of our oldest and most fundamental constitutional principles, the "wall of separation" between government and religion.

The wall of separation is a myth. The record of the debate in Congress on the First Amendment ban against "establishment of religion" clearly indicates that its framers intended only to prohibit the *federal* government from designating a *particular* church to which all citizens must give their allegiance and their financial support. For 200 years the participants in the American constitutional consensus have understood the difference between establishing a church and saying a prayer.

They have invoked the aid of God in their legislative sessions, on their coins, in their national anthem, in their courts and—from the very beginning—in their public schools.

In 1962 six justices of the Supreme Court reversed the settled understanding of the meaning of the First Amendment, holding that it was unconstitutional for a school district to permit students to join in a brief nondenominational morning prayer. The Reagan amendment would simply reverse that decision and its progeny. The amendment would not require that prayers be said in public schools, but the decision would be made (as the framers of the Constitution intended it to be made) in local communities rather than in federal courts.

Will Choice Offend People?

The arguments advanced by critics of the amendment are the same arguments that convinced the justices in 1962. They tend to show not that school prayer violates the constitution, but that it might be a bad idea.

The central problem with saying prayers in school is that somebody must choose the prayer. If the choice is left to local school authorities, they are free to choose prayers that could offend people. Christian prayers may offend Jewish students; Protestant prayers may offend Catholics, indeed, any prayer directed to a "personal" God may offend a student who believes that the Supreme Being is a "life-force," or that there is no God.

Alternatively, school boards may take it upon themselves to write their own prayers in an effort to avoid offending anyone. Such bureaucratic productions might be bland affirmations of reliance upon a lowest-common-denominator sort of God, a God with no attributes. To parents who wish their children to grow up loving and respecting a real God who is not at all boring, a meaningless prayer or an ugly prayer might be worse than no prayer at all.

Nor do critics of the amendment believe that school prayer will be truly voluntary. Although the Reagan amendment provides that no student may be forced to participate in any prayer to which he objects for any reason, they fear that students will be subliminally coerced into praying, or that they will be forced to listen to prayers with which they do not agree.

In the 200 years during which prayers were said in our public schools, they were not typically used as instruments of sectarian oppression.

To decide whether there ought to be a constitutional rule against prayer in the schools, however, one should consider not only the worst that might happen if prayer is permitted, but also the possible consequences of its prohibition. I am not sure that it is ever possible for an institution to be neutral about a question of fact or value. When the institution is a school and the question is what attitude students will have toward God, it is not at all clear that neutrality is achieved by never mentioning God except in discussions of speculative philosophy and medieval history.

It is frequently observed that schools neither are nor should be merely places where facts are disseminated. Rather, a good school shapes the whole person; it prepares him for life in the world. Between the ages of six and 18—the years in which most of us develop attitudes about religion that will form the matrix for all future experiences and observations—our lives are built around the schools we attend. These schools treat Julius Caesar, Shakespeare, Nietzsche, Washington, Reagan and Brezhnev as real persons whose ideas and actions matter; only God is hypothetical and contingent. Among the values that are fundamental to our civilization, the public schools attempt more or less successfully to inculcate in their students the love of freedom, of equality and of their fellow human beings. The love of God is conspicuous in its absence.

Neutrality toward God, in other words, is another myth. I know because I've tried it. I have doubts about God, and my doubts sometimes rise (or descend) to the level of disbelief. But I know that if God exists He is the most important thing in the universe and in my life. When I try to conduct any part of my life without regard to God I am not standing still but turning away.

God is also too important to be left out of the institution that seeks to prepare my child for life in the world. Like most Americans, I cannot afford private schools. The public schools will present my child with a set of facts and values that either includes or excludes God. I believe neither option to be neutral, so I hope his school day will include prayer, which is the affirmation of the love of God.

School is not, of course, the only influence in the lives of our children. Parents can teach their children how to pray. Parents can also teach their children patriotism and sex education. There is at least as good a chance that a child will be adversely affected by a teacher with idiosyncratic ideas about sex as by one who says the wrong prayer, but even the most fervent opponents of sex education seek only to persuade their school boards to omit it from the curriculum. Nobody thinks that the Supreme Court should declare it unconstitutional.

The observation that the Reagan amendment would not mandate school prayer but merely take power over the decision away from courts and give it back to school boards, goes a long way toward answering the horror stories advanced by opponents of the amendment. Any power is subject to abuse, but the possibility of abuse is seldom a sufficient argument against a power that can also be wielded beneficially.

The American political tradition is one of respect for minority opinions: In the 200 years during which prayers were said in our public schools, they were not typically used as instruments of sectarian oppression, and there is no reason to believe that

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Americans would use prayer as a way to offend their friends and neighbors after the passage of the amendment.

Some people would be offended. Some people are offended by the Christmas tree across from the White House, and some people were probably offended by the rabbi and the priest at the graduation I attended. Some people take religious objection to the Pledge of Allegiance to the flag, and the Supreme Court has held that their children need not participate in the pledge. The Reagan amendment provides the same guarantee with regard to prayer.

Government Is Not Being Neutral

I hope that school boards can find prayers that offend as few people as possible. Though my child is a Catholic, there are many beautiful prayers in the legacy of King David and of King James that would enhance his faith and brighten his days. In some communities it may be more appropriate for children of various faiths to compose their own prayers, or to engage in a minute of silent prayer or meditation. Other communities would almost certainly choose to have no prayer at all. But the communities should decide.

Against the hypothetical abuses of school prayer by local authorities if the Reagan amendment passes should be arrayed the absurd lengths to which the federal courts have carried their constitutional rule against prayer. The courts have banned not only "official" prayers but also Bible reading, posting of the Ten Commandments on classroom walls, prayer meetings voluntarily initiated by students after class at times when other student groups were allowed to meet and school policies that allowed students to engage in a minute of silent meditation. One court even upheld a school principal's order forbidding kindergarten students to say grace before meals.

The continued enforcement of a nationwide rule against school prayer, and the erection by judges of higher and wider walls of separation between school children and God, is no way for the government to be neutral about religion. Ratification of the voluntary school prayer amendment would restore the spirit of the First Amendment, whose framers intended it guarantee freedom *of* religion, not to i pose a regime of freedom *from* religion in community life.

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